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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1037

MITZI LEE REDKE,

Respondent,

vs.

ABRAHAM SILVERTRUST and JOHN ERVIN, as Executors of the Estate of Samuel Hayden, Deceased; ABRAHAM SILVERTRUST and RUTH K. ALLENDER HAYDEN, as Co-Trustees of the Amended Samuel Hayden Trust No. 1; RUTH K. ALLENDER HAYDEN; ABRAHAM SILVERTRUST and BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Testamentary Co-Trustees under the Will of Ann Gollos Hayden, Deceased,

Petitioners.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

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No. .....

MITZI LEE REDKE,

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vs.

ABRAHAM SILVERTRUST and JOHN ERVIN, as Executors of the Estate of Samuel Hayden, Deceased; ABRAHAM SILVERTRUST and RUTH K. ALLENDER HAYDEN, as Co-Trustees of the Amended Samuel Hayden Trust No. 1; RUTH K. ALLENDER HAYDEN; ABRAHAM SILVERTRUST and BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Testamentary Co-Trustees under the Will of Ann Gollos Hayden, Deceased,

Petitioners.

PETITION FOR WRIT OF CERTIORARI.

In accordance with Rule 23 of the Supreme Court Rules, petitioners Abraham Silvertrust and John Ervin, as Executors of the Estate of Samuel Hayden, Deceased; Abraham Silvertrust and Ruth K. Allender Hayden, as Co-Trustees of the Amended Samuel Hayden Trust No. 1; Ruth K. Allender Hayden; Abraham Silvertrust and Bank of America National Trust & Savings Association, as testamentary Co-Trustees under the Will of Ann Gollos Hayden, Deceased (hereinafter collectively referred to as "petitioners") tender the following petition for writ of certiorari in the above entitled cause.

I.

OPINIONS OF THE COURTS BELOW.

A. California Supreme Court. 6 Cal. 3d 94, 98 Cal. Rptr. 293 (1971). (Appendix A).

B. California Court of Appeal. 16 Cal. App. 3d 355, 93 Cal. Rptr. 898 (1971). (Appendix B).

C. Los Angeles Superior Court Memorandum Decision, unreported. (Appendix C).

II.

JURISDICTION.

The date of the judgment sought to be reviewed, as well as the time of its filing and entry, was November 24, 1971. Timely petitions for rehearing were filed by petitioners and respondent. The California Supreme Court extended the time within which rehearing could be granted to and including January 21, 1972. On December 29, 1971, the Court modified its opinion pursuant to petition for rehearing filed by respondent while denying petition for rehearing filed by petitioners. The decision of the Supreme Court became final on January 28, 1972, 30 days after the modification of judgment. [*California Court Rules*, Rule 24.]

This Court's jurisdiction is invoked under and pursuant to 28 U.S.C. §1257 (3) and Rule 19 of the Supreme Court Rules.

This petition was filed within 90 days of the date on which the California Supreme Court entered judgment.

III.

QUESTIONS PRESENTED.

A. Whether an agreement that tends to undermine and circumvent the federal estate tax law is enforceable, notwithstanding the parties' good faith in making the agreement.

B. Whether an undisclosed oral contract to provide by will made contrary to advice of the parties' tax and legal advisors (who were given the responsibility of drafting their wills and preparing their federal estate tax returns), is enforceable if it will result in improper savings in federal estate taxes, and *will invite others in similar circumstances to do the same.*

C. Whether an agreement which tends to promote tax evasion is against federal public policy and unenforceable, notwithstanding the parties' good faith in making the agreement.

IV.

STATUTES AND REGULATIONS INVOLVED.

A. 26 U.S.C. §2056. Federal marital deduction (Appendix D).

B. U.S. Treas. Estate Tax Reg. §2056 (b) (5) (g)-(2) (Appendix E).

C. U.S. Treas. Estate Tax Reg. §2056 (e)-2 (a) (5) (Appendix F).

V.

STATEMENT OF THE CASE.

A. Introduction.

At first glance this case may appear to involve merely an effort by a third party donee beneficiary (respondent) to enforce an oral contract to provide by will. An analysis of the case, however, reveals much more.

This case presents vital issues of public policy that materially affect the federal estate tax law, those responsible for collecting such taxes, taxpayers incurring liabilities for such taxes, and those who advise taxpayers in planning their estates.

During the marriage of Ann Gollos Hayden (respondent's mother) and Samuel Hayden (respondent's stepfather), lasting approximately eight years until Ann's death in 1963, both employed well qualified tax and legal advisors for advice in connection with their respective estate plans. In view of the large size of their respective estates (Ann's became substantial in about 1960 due solely to Samuel's efforts), both were acutely aware of the importance of proper estate planning which would preserve as much of their respective estates as possible, free of death taxes, for the benefit of the survivor.

In 1948 the federal government gave all husbands and wives the right to eliminate federal estate taxes on one-half of the separate property of the first to die, thus treating separate property the same as community property. This right was created by a new statutory

estate tax deduction called the "marital deduction." To qualify for the marital deduction, the trust instrument must, among other things, *give the survivor the absolute, unrestricted power* to transfer the remainder *to anyone* at death.

For some years before Ann died, Ann and Samuel had provided generously for one another in their respective wills and trusts. Both provided that one-half of their separate respective estates would go to the survivor. Each of their estate plans provided substantial tax benefits consisting of a maximum federal marital deduction and a maximum California inheritance exemption (referred to jointly herein as the "marital deduction"), the requirements for which were separately inquired into by Samuel and Ann, and were thoroughly discussed and explained to them on several occasions, the last time being a few months before Ann died. Ann was told that she could give one-half of her separate estate to Samuel and obtain at the same time maximum savings in death taxes. She was advised several times that to obtain this savings in death taxes Samuel had to have full power to give the property inherited from Ann *to anyone Samuel wanted.* If Samuel were required to transfer Ann's property to any particular person or persons, Ann was told that the deduction would be lost and Ann's death taxes would be more than doubled. Ann was informed by her attorney that this increase in death taxes due to loss of the marital deduction might be as much as $150,000.

The trial court found that about six weeks before Ann died, Samuel and Ann entered into a binding oral agreement whereby Ann had Samuel promise to give whatever he might inherit from her to respondent. Samuel's power to transfer Ann's property to whomever he wished was thus restricted, contrary to her written will and trust. Consequently, the marital tax deduction was not *lawfully* obtainable.

After the oral agreement was made, Ann decided to amend her estate plan in writing by providing more generously for respondent *but without changing the marital deduction trusts or any other provisions for Samuel.* Ann spoke at length on three separate occasions with her tax and legal advisors concerning these changes; she made an amendment in writing to her trust as a result of these conferences; she also made a written transfer of assets from her probate estate to her trust. Samuel also conferred with his tax advisor and executed a written amendment to his trust, all after the oral agreement was made. Throughout this entire period of communication with their respective advisors, Ann and Samuel never mentioned any oral agreement. If disclosed, the agreement would have had a heavy impact on the tax consequences to Ann's estate.

At Ann's death the marital deduction was taken pursuant to the *written* documents (her will and trust) and $178,000 in estate taxes was saved as a result thereof. Those who prepared Ann's federal estate tax return (the same advisors to Ann and Samuel before Ann's death) were not told and did not know of the existence of the oral agreement. Of course, the federal government had no way of learning of the oral agreement.

B. Summary of Facts.

1. General Background.

Samuel's marriage to his first wife, Katie, lasted almost 50 years. He was widowed in February 1955 [14 R.T. 3674]. Three adult children and six grandchildren of their marriage survived both Katie and Samuel [13 R.T. 1364-1367].

Shortly after Katie's death, Samuel met Ann Gollos, a widow. On May 15, 1955, Ann and Samuel were married [1 R.T. 33-35]. Ann had two adult children by a previous marriage, Warren Gollos and Mitzi Gollos Redke (respondent herein), both of whom were married and lived apart from Samuel and Ann.

At the time of her marriage to Samuel, Ann's net worth was about $20,000 to $40,000 [Find. VI, I C. T. 150]. During their marriage Samuel built up Ann's estate to about $910,000 at her death on April 5, 1963 [11 R.T. 2758; 2764-2765] [Find. VI; I C.T. 150]. Ann's substantial wealth at the time she died was created solely through Samuel's efforts, business experience and acumen [Find. VI; I C.T. 150]. During Ann's lifetime, Samuel was instrumental in providing at least $680,000 for the benefit of respondent apart from her claim in this lawsuit [Find. XXIV; I C.T. 158-160; 4 R.T. 936-945; 15 R.T. 3803; Ex. 121; 1 R.T. 50-51; 11 R.T. 2835-2836, 2846, 2878-2880; 6 R.T. 1514-1516; 5 R.T. 1349-1351; Ex. V].

2. The Estate Plans of Ann and Samuel.

Throughout the course of their marriage, Samuel and Ann demonstrated care and precision in reducing their estate plans to writing. Ann, for example, executed three wills, one codicil, one *inter vivos* trust and an

amendment thereto. [Exs. 8, 30, 31, 32, 33, 48, 49, 50].

For some years before Ann died, Ann and Samuel were regularly advised by Abraham Silvertrust, a certified public accountant, and John W. Ervin and Leonard Cohen, members of the tax-oriented law firm of Ervin, Cohen & Jessup.

Mr. Silvertrust has been a certified public accountant since 1927. He has specialized in taxation and finance, organized the first tax department for Arthur Andersen & Co. and became a partner in that firm in 1944 [10 R.T. 2561-2563].

John W. Ervin and Leonard Cohen, admitted to practice in 1944 and 1952, respectively, have each specialized in tax matters and estate planning [3 R.T. 590, 636-638]. Mr. Ervin has been the Director of the annual USC Tax Institutes since 1947 and Professor of Law teaching taxation and estate planning at the USC Law Center from 1947 to 1966 [3 R.T. 638-639; 14 R.T. 3700-3701].

On February 23, 1963, the date the trial court found the oral agreement was made, the combined effect of Ann's will [Ex. 30] and her revocable trust [Ex. 32] was, in pertinent part, as follows:

> (1) One-half of Ann's property was to go for the benefit of Samuel (free of death taxes) in marital deduction trusts and Samuel was to have an unrestricted power to appoint the remainder to anyone he wished (an essential condition for allowance of the deduction).
>
> (2) The other one-half of Ann's property (less death taxes) was to be held in residuary trusts for the benefit of respondent and her brother or their respective issue.

3. The Significance of the Marital Deduction to Ann and Samuel.

Both Abraham Silvertrust and John W. Ervin carefully explained to Samuel and Ann on numerous occasions that the marital deduction and its tax advantages would be lost if the surviving spouse did not have the right to give the property he or she inherited from the other, to anyone he or she pleased [10 R.T. 2590; 14 R. T. 3685, 3687, 3689].

Mr. Ervin also explained to Ann that if the marital deduction were not taken or were disallowed, her death taxes would be doubled (resulting in additional taxes of approximately $178,000) [14 R.T. 3710, 3717-3718].

4. The February 23, 1963 Bedroom Conversation.

On February 22, 1963, Ann's son Warren died very unexpectedly [1 R.T. 57-58]. The trial court found an oral agreement was made the next day in Ann's bedroom to the effect that Samuel would give all property inherited from Ann to respondent.

5. Ann's Conduct After February 23, 1963.

(a) *Ann's Conversation With Her Accountant About the Amendment to Her Trust.*

About a week *after* the bedroom conversation of February 23, 1963, Abraham Silvertrust was asked by Ann to call at the Hayden home to discuss a change in her trust [10 R.T. 2622]. He went to the Hayden home the following day and talked to her alone [10 R.T. 2622-2623]. The conversation opened with Ann stating that *she and her husband and daughter had* talked matters over in view of her son's death and *she had decided to give her daughter the share that*

she had previously provided for her son in the trust. [12 R.T. 2969; 3069-3070]. *She asked whether or not such a change would have any bearing on what she had provided for her husband in her trust and whether or not it would change the tax picture* [10 R.T. 2627]. *She said she was anxious not to disturb the situation where she had provided for Mr. Hayden* by giving him half of her property and providing for $30,000 a year minimum to him [10 R.T. 2627]. Mr. Silvertrust replied that, *if this were the only change,* it would have no effect upon her husband's interest but that the overall tax would be increased somewhat because the California state tax rates would be somewhat higher by reason of there being one beneficiary subject to tax instead of two [10 R.T. 2627-2628]. Ann made no reference to any agreement or promise by Samuel to give all of her property to the respondent [10 R.T. 2629].

(b) *Ann's Conversation With Her Attorney About the Amendment to Her Trust.*

Approximately two weeks *after* the February 23 agreement found by the trial court, Ann called her attorney, Leonard Cohen, to the Hayden residence to discuss an amendment to her revocable trust [13 R.T. 3183-3184]. Ann began the conversation by saying that, "Sam and I have been discussing this and I feel that inasmuch as [Warren] died I would like to change the *inter vivos* trust to leave [Warren's] share to Mitzi." [13 R.T. 3184]. A discussion ensued between Ann, Samuel and Mr. Cohen concerning the wisdom of depriving Warren's children of the property which he otherwise would have inherited had he lived; after considering the matter, Ann "decided that she

would leave a thousand dollars in the *inter vivos* trust to each of the children of [Warren] with instructions to amend the trust accordingly and leave the balance of Warren's share to [respondent]" [13 R.T. 3184-3187]. Ann made no statement about giving all of her property to respondent and no promise by Samuel to Ann was even suggested [13 R.T. 3187].

Mr. Cohen drew an amendment pursuant to Ann's instructions which Ann signed on March 15, 1963 [Ex. 33]. This written amendment, *made after the agreement found by the trial court,* reaffirmed all other provisions of her December, 1962 trust, *including the marital deduction trust for Samuel* [Ex. 33].

(c) *Ann's Conversation With Her Accountant About the Transfer of Additional Property to Her Trust.*

On March 26, 1963, Mr. Silvertrust received a telephone call from Ann asking him to come over to discuss making additional transfers of property to her trust [10 R.T. 2633-2634]. After discussing the matter [10 R.T. 2634-2635], Ann remarked that her desire to make the transfer was really prompted by the idea that the more she transferred to the trust the more she would be shifting from her son's children to respondent [10 R.T. 2637].[1] Ann did not mention any promise or agreement with Samuel concerning disposition of her property nor indicate in any way that there were any understandings other than those written in her trust and will [10 R.T. 2638]. That same day, the transfer was executed by Ann [Ex. 50; 5 R.T. 1184].

[1]Ann did not give any instructions to change her will [13 R.T. 3186-3187]. After the transfer, enough remained in Ann's probate estate that Warren's children received approximately $40,000 from that source [Ex. 8].

6. Ann's Death and Subsequent Events.

Ann died on April 5, 1963 [Find. III; 1 C.T. 149]. Under her trust, as amended, and her will, one-half of Ann's estate passed to Samuel (the bulk of it in marital deduction trusts for the benefit of Samuel during his lifetime with an unrestricted power of appointment over the remainder in Samuel). Approximately 90% of the remaining one-half (less death taxes) was placed in trust for the benefit of respondent [Exs. 30, 32 and 33]. By this action respondent now seeks the other half which Ann gave to Samuel.

In the administration of Ann's estate, the marital deduction was claimed and allowed with a tax savings of approximately $178,000 [Ex. 114; 14 R.T. 3710]. The tax savings directly benefited the respondent since, under Ann's trust and will, all death taxes were to be paid out of the residue [Exs. 30, 32, 33] and it was the respondent who was residuary beneficiary.

After Ann's death, Samuel met Ruth Allender, a widow. He married her on May 29, 1963, and remained happily married until his death in January, 1965 [7 R.T. 1869].

In May and June, 1963, Samuel amended his revocable trust and will, respectively, to provide for his wife Ruth, his natural children, Barney and Rose, and his natural grandchildren [Exs. 34 and 43], eliminating provisions for the benefit of respondent because he felt she already was generously provided for as a result of his efforts [14 R.T. 3697-3699; 14 R.T. 3518-3519].

C. Conflicting Decisions by the California Court of Appeal and California Supreme Court.

The California Court of Appeal, unanimously reversing the trial court, refused enforcement of the oral agreement on the ground that it would encourage federal tax evasion and, consequently, was against public policy (See Appendix B).

The California Supreme Court granted respondent's petition for hearing, vacated the decision of the Court of Appeal, and held enforcement of the undisclosed oral agreement would not encourage any tax evasion (See Appendix A).

D. Timeliness of the Federal Question.

Petitioners first raised the questions involved in this petition in the trial court through testimony of John Ervin, qualified as an expert in taxation, and by argument of counsel during trial [15 R.T. 3739, 3736, 3728-29; 3725; 18 R.T. 4512-13, 4515-16] (See Appendix G). The argument was also made in petitioners' trial briefs.[2]

In the memorandum opinion of the trial judge, the public policy and illegality arguments were considered and rejected [III C.T. 750-51]. The findings of fact and conclusions of law of the trial court covered this issue [I C.T. 156-181].

Petitioners' primary argument on appeal has been and is that enforcement of the oral agreement is against public policy (See App. Op. Br. pp. 24-30; App. Cl. Br. pp. 6-11; Appendix H). Both the Court of Appeal and the State Supreme Court considered this issue, arriving at different conclusions. Having been considered by the State Supreme Court, it is therefore, "irrelevant

[2]The trial briefs were not included in the record on appeal.

to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided . . ." [*Manhattan L. Ins. Co. v. Cohen*, 234 U.S. 123, 134. To the same effect: *Charleston Federal S. & L. Assn. v. Alderson*, 324 U.S. 182, 185-186. See, also, *Swain v. Alabama*, 380 U.S. 202, 222 (note 30); and, compare, *Ungar v. Sarafite*, 376 U.S. 575, 582-583].

Moreover, the defense of illegality may be asserted "even though the validity of the contract is not set up as a defense." *Warner Bros. Theatres v. Cooper Foundation*, 189 F. 2d 825 (10th Cir. 1951). And "when it appears from the pleadings or the evidence that the contract in suit is tainted with illegality, the court has the right, and indeed the duty to raise the question *sua sponte* (citations omitted)." *Williams v. Wilson*, 181 Fed. Supp. 351 (E.D.Ark., 1960). Such a defense ordinarily cannot be waived. *Nachman Spring-Filled Corporation v. Kay Mfg. Co.*, 139 F. 2d 781 (2d Cir. 1943).

VI.

ARGUMENT.

A. The Oral Agreement Is Unenforceable Because It Is Against Public Policy.

The marital deduction available under federal and state law is permissible only if the surviving spouse receiving the property has the *unrestricted* right to give the property to *anyone*. For example, if the surviving spouse is bound by contract, as the court found in the case at bar, to bequeath or devise the property to any particular person or persons, the deduction is lost. *Batterton v. U.S.*, 406 F. 2d 247 (5th Cir. 1968); *Lindsay v. U.S.*, 167 Fed. Supp. 136 (D.C. Md. 1952); U.S. Treas. Estate Tax Reg. §2056(b)(5)(g)(2).

Allowance of the marital deduction is uniquely dependent upon written documents such as written wills or trust instruments. Enforcement of *oral* agreements in contravention of the provisions of *written* instruments providing for the marital deduction will invite tax avoidance by those who act in ignorance of the law and encourage tax evasion by others who know the law and seek to take unlawful advantage of it.

Public policy requires the courts to refuse to enforce *oral* agreements in all cases where they contravene *written* provisions of a will or trust designed to establish a marital deduction. The policy applies with special force where, as here, one seeks and receives legal and tax advice with respect to the preparation of written documents that are the sole basis for establishing the marital deduction both before and *after* the oral agreement. In this case, after Ann Hayden sought and received legal and tax advice from her experienced advisors, she instructed her accountant to consult with her lawyers and her lawyers to prepare her will and trust in order to obtain the marital deduction that reduced her death taxes by more than one-half. When she decided to change her written estate plan and consulted with her lawyer and accountant for that purpose in March, 1963, after the oral agreement was made, she had a duty to disclose any agreement changing Samuel's rights and to request her advisors to make the corresponding changes. The duty to disclose is particularly clear in this case where Ann formally amended her estate plan *after* her oral expressions of intent on February 23, 1963, and expressly reaffirmed her earlier provisions for Samuel giving him her property in marital deduction trusts with the unrestricted right to transfer it to anyone, the result of which preserved for Ann's estate the marital deduction. Under

such circumstances a breach of the duty to fully disclose renders the earlier oral agreement unlawful and unenforcible.

The vital importance of the public policy that a court not enforce an *oral* agreement in conflict with the decedent's *written* marital deduction provisions arises from the following facts and considerations:

a. The tax benefits are matters of legislative grace based upon strict statutory conditions required to be set out in the documents of transfer (here the will and trust documents).

b. Those written documents are the only basis that those who prepare the federal estate tax returns have in claiming the tax benefits that reduce by more than one-half the death taxes that would otherwise be payable by the estate.

c. There is no way to ascertain or to ask the deceased person whether he or she placed an oral limitation on the marital deduction provisions.

d. The federal revenue agents allow the marital deduction tax benefits on their audit if the written documents properly so provide. If they knew of any agreement altering the documents of transfer, they would have to disallow the deduction.

e. Except for refusing to enforce them, there is no effective deterrent against secret agreements limiting the marital deduction provisions since criminal tax fraud cannot be asserted against either party because both are dead before the dispute arises.

f. The tax laws are administered generally on the basis of a full and truthful disclosure by taxpayers. To facilitate tax collection and prevent tax evasion taxpayers must be discouraged from concealing or otherwise failing to communicate to their advisors any agreements which may affect the amount of tax due the federal government.

It is submitted that if respondent prevails, she will benefit greatly from Ann's noncompliance with the marital deduction provisions; such a result will encourage other husbands and wives to make the same kind of oral agreement. They could take the benefits of the tax savings and escape criminal punishment by their demise. If the undisclosed agreement were performed, the tax authorities would never know about it. If the undisclosed agreement were not performed, their third party beneficiary could rely on the courts to carry it out. Neither result is consistent with sound public policy.

B. The Decision of the California Supreme Court Is Based Upon Platt v. Wells Fargo Bank,[3] a Case Which Is Not in Accord With Applicable Decisions of This Court; in Any Event, Platt Is Inapposite to the Case at Bar.

The California Supreme Court erroneously concluded that in the absence of a fraudulent intent to evade taxes, the agreement between Samuel and Ann must be enforced. In reaching that result, the California Supreme Court erroneously interpreted the applicable decisions of this Court as well as its own. The decisions of this Court make clear that fraudulent intent (as required in *Platt*) is not a condition to denial of enforcement of an agreement which contravenes public policy. Contrary to *Platt*, an agreement may be unenforceable *without regard to the good faith of the parties*, based upon its tendency to encourage or promote acts which undermine federal statutes or federal public policy.

---

[3] *Platt v. Wells Fargo Bank*, 222 Cal. App. 2d 658, 35 Cal. Rptr. 377 (1963), *cert. denied* 377 U.S. 965 (1964).

The following federal cases recognize that if an agreement tends to promote unlawful acts, *notwithstanding the good faith of the parties in making the agreement*, the agreement will not be enforced.

In *Le John Manufacturing Company v. Webb*, 222 F. 2d 48 (D.C. Cir. 1955), an action was brought to recover commissions under a contingent fee agreement providing for the procurement of a contract with the federal government. The agreement conflicted with an Executive Order in effect at that time. Because the "general tendency" of such an agreement would encourage others to do the same, it was thus held unenforceable as against public policy notwithstanding "the efforts of the plaintiff on behalf of the defendant did not involve the use of any political or special influence, or any corrupt or sinister practices contrary to the public interest." (at p. 51).

Similarly, in *Weitzel v. Brown-Neil Corporation*, 152 F. Supp. 540 (N.D.W.Va. 1957), *affd.* 251 F. 2d 661 (4th Cir. 1958), the court stated: "However, the courts have been explicit in their decisions that *nothing sinister need be shown* in order to invalidate a contract for contingent fees as a violation of public policy." (Emphasis added; at p. 549).

The "prophylactic rule", applicable where contracts are deemed to be against public policy, is that "actual injury is not the principle the law proceeds on, in holding such transactions void. . . . The rule is not intended to be remedial of actual wrong, *but preventive of the possibility of it.*" (Emphasis added). *Colonell v. Goodman*, 78 F. Supp. 845, 848 (E.D. Pa. 1948), *affd.* 169 F. 2d 275 (3d Cir. 1948), *cert. denied*, 335 U.S. 870 (1948).

In *Warner Bros. Theatres v. Cooper Foundation*, 189 F. 2d 825 (10th Cir. 1951), the court refused enforcement of an agreement contrary to the anti-trust laws "regardless of the corrupt intention of the parties." (at p. 829).

In *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F. 2d 253 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), an indemnity agreement was held unenforceable as against public policy although the contracting parties were in good faith.

In *Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light and Power Co.*, 97 Fed. Supp. 952 (D.C. Md. 1951), *affd.* 194 F. 2d 89 (4th Cir. 1952), *cert. denied*, 343 U.S. 963 (1952) a contract which violated the Sherman Act, state law and common law as being an illegal restraint of trade was held unenforceable ". . . irrespective of the pure intention or good faith of the parties." (at p. 956).

Providence Tool Co. v. Norris, 69 U.S. 45 (1865), "the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting *tendency* of the agreements." (Emphasis added; at p. 54).

Marshall v. The Baltimore and Ohio Railroad Co., 57 U.S. 314 (1853), "Hence all contracts to evade the revenue laws are void." (at p. 334).

In *Hazelton v. Sheckels*, 202 U.S. 71 (1906), "legitimate" services were held to be noncompensable simply because of the "tendency" of the contract. (at pp. 78-79).

In *Noonan v. Gilbert*, 68 F. 2d 775 (D.C. Cir. 1934), an agreement against public policy was held unenforceable "regardless of whether corrupt practices are resorted to or contemplated." (at p. 775).

McMullen v. Hoffman, 174 U.S. 639 (1899) states: "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts." (at p. 648).

In *Weil v. Neary*, 272 U.S. 160 (1929), an agreement for payment of attorney's fees was held unenforceable as against public policy because, among other things, the services rendered placed the attorney in a position of conflict of interest between clients. That his services actually may have benefited all parties was deemed immaterial.

The paramount importance of protecting the administration and enforcement of the federal estate tax law cannot be questioned. In *Kopasz v. Wymer*, 118 Cal. App. 2d 119, 257 P. 2d 707 (1953), the court refused to enforce an agreement although innocently made, because one of its effects was to:

> ". . . *deprive the State of California and the United States Government of taxes properly due on said property.*
>
> "It is thus clear that the agreement was void as against public policy. . . ." (Emphasis added; at pp. 708-9).

Under any circumstances, *Platt v. Wells Fargo Bank*, *supra*, has been inappropriately applied to the facts in the case at bar. The court stressed in *Platt* the good faith reliance upon the advice of legal counsel:

> "As we have stated above, the *primary issue* in this case is whether the parties acted in good faith and *on the advice of their counsel* in attempting to obtain the marital tax deduction." (Emphasis added).

In *Platt*, the parties made full disclosure to their attorney and relied upon his advice in executing the will and written agreement between the husband and nephew. If the court had refused to enforce the written agreement, the sins of counsel would have been visited unjustifiably on the innocent clients. In our case, all the facts are to the contrary.

Platt, recognizes that tax evasion clearly should not be encouraged. The "tendency" of the agreement in *Platt* is not destructive to the tax laws because members of the bar have sufficient integrity to refrain from initiating promotional schemes to evade taxes. The lack of any tendency toward unlawful schemes arising from *Platt*, however, has no application in the case at bar. In this case *the parties did not act in reliance on advice of counsel.* To the contrary, the advice given was not heeded. The effect of the decision by the California Supreme Court is to sanction precisely what Samuel and Ann were told by their legal and tax advisors not to do.

C. The Federal Question Presented in the Case at Bar Regarding the Enforcement of an Agreement Which Tends to Promote Subversion of the Federal Estate Tax Law Has Not Heretofore Been Determined by This Court.

Petitioners' research has not disclosed any decision by this Court dealing with the enforcement of an agreement which will encourage subversion of the tax laws as in the case at bench.

Petitioners respectfully request the United States Supreme Court to grant the petition for writ of certiorari to decide this novel and substantial federal question.

VII.
CONCLUSION.

The ability of the federal government to effectively administer and enforce the federal estate tax laws is threatened and will be substantially impaired if the decision of the California Supreme Court is permitted to stand.

Petitioners have set forth the tax laws, cases and reasons why this *oral* agreement is against public policy and unenforceable. The greatest danger in such an *oral* agreement is that it provides virtually a foolproof way of defrauding the federal government out of taxes properly due. An oral agreement, *if performed*, never would be discovered; the government is defrauded and the third party beneficiary reaps the unlawful benefits. If the oral agreement is not performed, the beneficiary may accept the risk of losing some tax benefits in an attempt to enforce the agreement. Under such circumstances, the federal government is bound to be shortchanged.

Had Samuel performed the oral promise which Ann extracted, the federal taxing authorities would be deprived forever from learning that the marital deduction was improperly claimed. Administration of the tax laws cannot be made to depend upon whether such an *oral* agreement is voluntarily performed. Written wills and trusts of a decedent clearly are intended to be cornerstones for calculation of death taxes, and it is upon these documents that federal taxing authorities primarily rely. Petitioners respectfully submit that if the oral agreement in this case is upheld, it will create an estate planning device that will invite every husband and wife with substantial separate property to circum-

vent the statutory requirements for the marital deduction and still claim tax benefits which may eliminate more than one-half of death taxes.

The facts of this case are unique. If this Court takes the opportunity presented in the case at bar to protect the federal policies underlying the administration and enforcement of the estate tax laws, persons in similar factual circumstances will be discouraged from attempting to obtain improper tax benefits. On the other hand, enforcement of the oral contract in this case clearly will tend to promote this undesirable practice in the future.

Respectfully submitted,

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Attorney for Petitioners.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

Mitzi Lee Redke, Plaintiff and Respondent, v. Abraham Silvertrust et al., Defendants and Appellants. L.A. 29886, Super. Ct. 873203.

Filed: Nov. 24, 1971.

Plaintiff Mitzi Lee Redke brought an action in Los Angeles Superior Court to enforce the terms of an oral agreement allegedly made for her benefit between her mother, Ann Hayden, and her stepfather, Samuel Hayden, both of whom are new [sic] deceased, whereunder Sam agreed to bequeath certain of Ann's separate property to Mitzi. Defendants, who are the executors of Sam's estate, co-trustees of a trust created by him, and testamentary trustees under Ann's will, appeal from a judgment in Mitzi's favor. We have concluded that, except for one minor modification, the judgment should be affirmed.

The pertinent facts underlying the dispute are as follows: In 1955, Sam, a widower with three adult children, married Ann, mother of Mitzi and Warren. By 1963, Ann's separate property had grown from approximately $20,000-$40,000 to over a million dollars, largely a result of Sam's assistance in managing her investments. Ann executed a will and an inter vivos trust which provided that half of her separate property would be placed in a marital deduction trust for Sam, giving him a general power of appointment over that property; the remaining half was to be placed in trust for her children, Mitzi and Warren. Sam executed a sim-

ilar will and trust leaving half of his property to Ann, and half in trust for Mitzi and Warren.

On February 22, 1963, Warren died unexpectedly from a heart attack. Ann, who was suffering from terminal cancer, was informed of her son's death the following day. That news was a shock to Ann, and she immediately became concerned about providing for Mitzi, whose husband was also ill. Consequently, she informed Sam, in the presence of her nurse, Mitzi and another person, that she wanted to call her lawyers to change her will and trust to leave all of her separate property to Mitzi. Sam assured her that no such changes were necessary, and promised that if Ann died, Sam would leave his share of Ann's property to Mitzi upon his own death and would see that Mitzi received all of Ann's property. Ann agreed. Thereafter, the only substantial changes made in Ann or Sam's estate plans prior to Ann's death were amendments to their trusts to give Warren's share of their trust estates to Mitzi; Ann also executed a document transferring to her trust most of her remaining property.

Ann died on April 5, 1963. On the following day, Sam offered to give to Mitzi Ann's jewelry and furs, a matter discussed separately below. Sam also reaffirmed to various persons, including Mitzi, his promise to leave Mitzi his share of Ann's property. Nevertheless, within a few months following Ann's death, Sam met and married Ruth Allender and shortly thereafter amended his trust and will eliminating all provision for Mitzi and naming as beneficiaries his new wife and his natural children. Sam died in 1965, and Mitzi filed creditor's claims against his estate based upon the oral agreement and the separate gift of furs and jewelry.

At trial, defendants denied the existence of the alleged oral agreement and contended, among other things, that such an agreement would be unenforceable under the statute of frauds and void as contrary to public policy, being an illegal evasion of federal and state death taxes. The trial court made extensive findings which, in effect, recognized the existence of the oral agreement and upheld its validity and enforceability. The court held that upon Ann's death Sam became constructive trustee for the benefit of Mitzi of all of Ann's separate property, furs and jewelry received by Sam from and after Ann's death, together with all income, interest and profits derived therefrom. The court's judgment ordered defendants to deliver to Mitzi certain designated stock valued at $392,186.48, with dividends and increments thereto, plus seven percent interest from the date of judgment. In addition to this stock, Mitzi was awarded the sum of $457,916.06, plus seven percent interest from the date of judgment. Mitzi also obtained judgment for all damages which she or Ann's estate may incur by reason of Sam's negligence or misconduct.

1. *The Oral Agreement*

In general, a contract to make a particular testamentary disposition of property is valid and enforceable. As in every contract, "there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. [Citations.] Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed." (Brown v. Superior Court, 34 Cal.2d 559,

564-565; Brewer v. Simpson, 53 Cal.2d 567, 588-589.) If the contract is executed between spouses, a failure to perform it constitutes a violation of their confidential relationship and is constructive fraud which justifies the imposition of a constructive trust. (Day v. Greene, 59 Cal.2d 404, 411.)

The trial court correctly determined that the statute of frauds did not render the agreement unenforceable. "Although the statute requires that an agreement to make a provision by will be in writing (Civ. Code, § 1624, subd. 6; Code Civ. Proc., § 1973, subd. 6) a party will be estopped from relying on the statute where fraud would result from refusal to enforce an oral contract [citation]. The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute [Citation.]" (Day v. Greene, *supra*, 59 Cal.2d 404, 409-410; see Monarco v. Lo Greco, 35 Cal.2d 621, 623; Notten v. Mensing, 3 Cal.2d 469, 474; Mintz v. Rowitz, 13 Cal.App.3d 216, 223-225.)

The trial court found that Ann, by reason of her trust and confidence in Sam, and in reliance upon his oral promise, changed her position to her detriment, and to Mitzi's detriment, by not changing her will and trust to make Mitzi her sole beneficiary; she changed her position by maintaining the status quo despite her concern over her daughter's welfare. Defendants do not question the evidentiary support for this finding, nor do they dispute the applicable law set forth above. They do, however, contend that Sam and Ann

subsequently abandoned the agreement, a factual question which the trial court resolved in plaintiff's favor. There was ample evidence to support the court's finding that the agreement was not abandoned, including the fact that after Ann's death, Sam affirmed to five witnesses, including Mitzi, his agreement to leave his share of Ann's property to Mitzi.[1] We conclude that the trial court correctly held that defendants are estopped to rely upon the statute of frauds.

Defendants' primary contention is that the agreement between Ann and Sam was illegal and against public policy as an attempted evasion of death taxes. By the terms of Ann's will and trust, Sam was given half of Ann's separate property for life, with an unlimited power to appoint the remainder. One of the purposes of framing Ann's estate plan in this manner was to take advantage of the tax benefits afforded by the federal marital deduction (26 U.S.C. § 2056) whereby death taxes may be lawfully avoided as to one half of a spouse's separate property. The federal deduction is only available, however, if the surviving spouse is given the unrestricted right to dispose of the property as he chooses. Any limitation upon that right could result in the loss of the deduction. Thus, "if the

[1]Defendants also point out that the trial court found that Sam's promise was *conditioned* upon Ann's agreement not to change her will and trust, and that the court also found that Ann in fact did change her trust by eliminating therefrom all provision for Warren. Defendants urge us to hold that Ann thereby breached her part of the agreement, relieving Sam from his obligations thereunder. The contention is wholly without merit. The essence of Ann's agreement, as found by the trial court, was that in consideration of Sam's promise, Ann would not change her will and trust *to leave her property to Mitzi rather than Sam.* Ann fully performed that agreement, and the fact that she modified her trust, following Warren's death, to eliminate his share was wholly consistent with, and not in breach of, the oral agreement.

surviving spouse entered into a binding agreement with the decedent to exercise the power [of appointment] only in favor of their issue, that condition [i.e., that the surviving spouse be given an unrestricted right of disposition] is not met." (Fed. Tax Reg. (1971) § 20.-2056(b)-5(g)(2); see Batterson v. United States, 406 F.2d 247.)

The evidence discloses that following Ann's death, Sam, as executor of her estate, claimed the marital deduction, obtaining a substantial tax savings. It is likely that had the existence of the oral agreement restricting Sam's right to dispose of Ann's property been disclosed to the taxing authorities, the deduction would have been disallowed. Defendants contend, therefore, that the agreement constituted a fraud upon the tax authorities and should not be enforced.

Since any wilful attempt to evade or defeat taxes is a crime (26 U.S.C. § 7201), had Ann and Sam entered into their agreement with the intent of fraudulently concealing its existence from the tax authorities for the purpose of improperly obtaining the marital deduction, it is likely that we would hold the agreement unenforceable. (See Platt v. Wells Fargo Bank, 222 Cal. App.2d 658, 664.) However, having failed to prove such an intent at trial, defendants cannot prevail.

There was, of course, nothing illegal per se in Sam's oral agreement to leave to Mitiz Sam's share of Ann's separate property, for that agreement could have been carried out in an entirely legal manner had Sam disclosed its existence to the tax authorities, or chosen not to claim the marital deduction. As a general rule, if a contract can be performed legally, a court will presume that the parties intended a lawful mode of perform-

ance. (West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 759.) Therefore, unless Ann and Sam entered into their agreement with the intent of fraudulently concealing its existence from the federal government for the purpose of obtaining the marital deduction, that agreement would be valid and enforceable. (Platt v. Wells Fargo Bank, *supra*, 222 Cal.App.2d 658, 664.)

The trial court found that Ann was a housewife with little familarity with business transactions, that Sam was the dominant influence in managing their legal and financial affairs, that Ann had no part in choosing the method by which Sam would carry out his promise to provide for Mitzi, that after the oral agreement was made, Ann (suffering from terminal cancer) had no concern with the tax consequences of that agreement and had no reason to suspect that Sam would proceed illegally in carrying it out, and that "Notwithstanding any explanations that may have been offered to her, it is doubtful that Ann had any particular or clear comprehension or understanding at any time of the technical aspects" of a marital deduction, or an unlimited power of appointment, or the tax laws pertaining thereto.

Defendants point to evidence that after the oral agreement was made, Ann failed to disclose its existence to her attorneys and tax advisers, despite the fact that she did discuss and make certain other changes in her estate plan and had been previously advised that in order to preserve the marital deduction Sam must be given an unrestricted power to appoint half her separate property to whomever he chooses. Defendants would infer from this evidence that Ann in-

tentionally concealed the agreement for the purpose of defrauding the tax authorities.

As noted in Platt v. Wells Fargo Bank, *supra*, 222 Cal.App.2d 658, 664, questions of "intent" and "purpose" are ordinarily questions of fact to be determined by the trial court. The trial court's findings regarding Ann's intent and state of mind are amply supported by the evidence, including the fact that it was Sam who counseled her not to change her will and trust, that Ann was in poor health during the period in question and had little knowledge of business transactions or tax laws, and that Ann entrusted Sam with the responsibility of managing her affairs. It is true that the evidence cited by defendants could have raised an inference that Ann concealed the oral agreement from her attorneys in order to gain tax benefits for her estate. A contrary inference could have been drawn, however, that Ann, in the suffering of her last days, either innocently forgot to mention the agreement or simply failed to appreciate its significance from a tax standpoint.

The evidence of Sam's intent is less clear, although it is undisputed that following Ann's death, as executor, he did claim the marital deduction for Ann's estate without disclosing to the tax authorities the existence of his agreement with Ann. However, even if we assume that Sam acted fraudulently in concealing the agreement, defendants may not rely upon his fraud as a shield against Mitzi's claim for breach of that agreement. As we noted in Tri-Q, Inc. v. Sta-Hi Corp., 63 Cal.2d 199, 219, quoting from 6A Corbin on Contracts, section 1518, page 744, "A bargain may be illegal by reason of the wrongful purpose of one or both of the parties making it. This is true even though

the performances bargained for are not in themselves illegal and even though in the absence of the illegal purpose the bargain would be valid and enforceable. A party who makes such a bargain in furtherance of his wrongful purpose can not enforce it, *even though it is enforceable against him by the other party if the latter is innocent of such a purpose.*" (Italics in original.)

Defendants also urge that regardless of Sam or Ann's intent, all such oral agreements should be declared void as against public policy, in order to deter others from attempting to evade death taxes by such a device. We cannot so readily assume, however, that other persons will be induced to violate the tax laws in this manner, or that the taxing authorities will fail to discover their fraud.[2] Cases will be rare indeed wherein the promisee spouse will be willing to forego the security of a formal, written estate plan in reliance upon oral assurances by the promisor spouse, solely to gain possible tax benefits at death. Moreover, we doubt that those few persons so inclined to commit tax fraud would be deterred from doing so by a ruling that such an agreement would be unenforceable, for if the agreement is carried out in accordance with its terms, the issue of enforceability would never be raised or litigated. We conclude that in the absence of fraudulent intent by the promisee spouse, an oral agreement to make a testamentary disposition of the nature involved herein is not void or unenforceable as against public policy. Accordingly, that portion of the trial court's judgment which upheld Mitzi's right to enforce Sam and Ann's oral agreement should be affirmed.

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[2]It should be noted that there is no limitations period on actions by federal taxing authorities to assess or collect a tax in cases involving fraudulent or willful attempts to evade taxes. (26 U.S.C. § 6501, subd. (c).)

2. *The Gift of Ann's Jewelry and Furs*

As an alternative theory for recovery of Ann's jewelry and furs, Mitzi contended (and the trial court found) that after Ann's death Sam gave these items to Mitzi, and subsequently agreed to repurchase them from her and to deposit the proceeds in her trust. Defendants contend, however, that the gift was incomplete, since Sam retained possession of most of the jewelry and furs rather than delivering them to Mitzi. (See Gordon v. Barr, 13 Cal.2d 596, 601-602; Blonde v. Estate of Jenkins, 131 Cal.App.2d 682, 686.) Nevertheless, as we have pointed out, Mitzi had an enforceable claim to Ann's jewelry and furs by reason of the oral agreement in her favor. Therefore, whether Sam in fact "gave" these items to Mitzi is irrelevant; he had already agreed with Ann to transfer them to Mitzi at his death, and he subsequently agreed with Mitzi to purchase them from her and to deposit the proceeds in her trust. Accordingly, the trial court properly awarded to Mitzi the fair market value of Ann's jewelry and furs, i.e., $76,800 as of the date of Sam's death.

Defendants contend that Mitzi should be bound by the valuation of the jewelry and furs set forth in the decree of distribution in Ann's estate, i.e., $37,915. However, since Sam's promise was to transfer these items to Mitzi at his death, their value at the time of *Ann's* death was not relevant. Moreover, most of the difference between the two valuation figures is represented by a $28,000 diamond ring belonging to Ann but inadvertently omitted from the decree of distribution in Ann's estate. Mitzi had no reason to question the accuracy of that decree, trusting in Sam to carry out his promise and transfer *all* of Ann's property to

her. Accordingly, it would be inequitable to hold Mitzi bound by the valuation and inventory of assets set forth in the decree in Ann's estate. The judgment of the trial court awarding to Mitzi the fair market value of Ann's jewelry and furs as of the date of Sam's death should be affirmed.

3. *Miscellaneous Questions*

a. *Liability for death taxes*

Defendants assert that since the trial court's judgment is silent concerning Mitzi's liability for death taxes on the money and property awarded to her, that judgment will have the effect of relieving Mitzi from death taxes to the detriment of Sam's heirs and estate. Without passing on the question of the parties' respective tax liability, it seems apparent that this question was neither presented to, nor litigated by, the trial court. If Mitzi in fact owes taxes on her share of Ann's property or is obligated to reimburse Sam's heirs or estate for taxes previously paid on property thereafter awarded to her, such matters may be determined in separate proceedings. (See Platt v. Wells Fargo Bank, *supra*, 222 Cal.App.2d 658, 670.) Moreover, we note that the trial court has retained jurisdiction to make such further orders between the parties as may be proper, and perhaps the court will agree to entertain the tax matter raised by defendants.

b. *Interest on money judgment*

The trial court awarded to Mitzi the fair market value of Ann's jewelry and furs and her interest in the home and furnishings, together with seven percent interest on those amounts from the date of Sam's death. Defendants maintain that since the value of the

foregoing property was in dispute throughout the trial. Mitzi's damages were unliquidated and an award of prejudgment interest was improper. (See former Code Civ. Proc., § 3287; Caplan v. Schroeder, 56 Cal.2d 515, 521.) As Mitzi points out, however, her cause of action was not based upon simple breach of contract but arose out of Sam's violation of his confidential relationship with Ann by his failure to perform his part of their agreement after having benefited from Ann's performance. "Such a violation of a confidential relationship constitutes constructive fraud and where, as here, unjust enrichment results a constructive trust may be imposed. [Citations.]" (Day v. Green, *supra*, 59 Cal.2d 404, 411.)

Since Mitzi has proceeded on the theory of constructive fraud, she is entitled to the benefit of Civil Code section 3288, which provides that "In an action for breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." Under the cases, the trial court may award prejudgment interest under section 3288 whether or not plaintiff's damages are "liquidated." (See Estate of Piercy, 168 Cal. 755, 758; Tevis v. Beigel, 174 Cal.App.2d 90, 101; Katz v. Enos, 68 Cal.App.2d 266, 278-279; see also Civ. Code, § 2237; Bass v. Youngblood, 221 Cal. App.2d 278, 289; Nathanson v. Murphy, 147 Cal. App.2d 462, 466-467; Brunson v. Babb, 145 CalApp.2d 214, 230; West v. Stainback, 108 Cal.App.2d 806, 819.) Since Sam had promised to turn over Ann's property to Mitzi upon his death, and since his failure to do so constituted constructive fraud, the trial court had discretion under section 3288 to award Mitzi interest from the date upon which the fraud occurred.

c. *Interest on cash proceeds from sale of stock*

The trial court awarded Mitzi seven percent interest on certain of Ann's stock sold by Sam following her death; interest is to run from the date of sale, rather than the date of Sam's death. Defendants contend that Sam's obligations to Mitzi did not arise until his death, and that his estate should not be held liable for interest prior to that time. Defendants fail to appreciate, however, that upon *Ann's* death, Sam became constructive trustee of Ann's property, with an obligation to hold *all* of that property for Mitzi's benefit. Upon Sam's breach of the agreement, Mitzi was entitled to the benefit of those statutory provisions, such as Civil Code section 2237, which 'measure' the liability of a defaulting trustee. (See McDaniel v. McDaniel, 275 Cal.App.2d 927, 944; Bank of America v. Ryan, 207 Cal.App.2d 698, 710.) Section 2237 obligates a trust who has wrongfully disposed of trust property to account for all profits so made, or the value of the use of the property, or to account for its proceeds with interest. Thus, the trial court properly awarded Mitzi interest, from the date of sale, upon the proceeds of the stock Sam sold during his life.

d. *Interest upon stock retained by Sam*

The trial court awarded Mitzi all of Ann's stock retained by Sam, together with seven percent interest upon its fair market value, which interest is to run from the date of judgment until the date of delivery to Mitzi. Defendants correctly contend that interest may only be awarded on a *money* judgment, and not upon a judgment awarding stock or other personal property. (Estate of Neilson, 57 Cal.2d 733, 748.

749; Sullivan v. Wellborn, 32 Cal.2d 214, 219; Jones v. Sacramento Sav. & Loan Assn., 248 Cal.App.2d 522, 531; Chase v. Leiter, 96 Cal.App.2d 439, 459; Estate of Lockhart, 21 Cal.App.2d 574.) Plaintiff's theory is that the court's judgment was in effect a money judgment since it ordered defendants to deliver the stock to Mitzi within five days after entry of judgment or face a money judgment for the fair market value of the stock, computed according to various specified methods. However, defendants assert that in fact they did deliver the stock to the clerk of the court "shortly" after entry of judgment, and plaintiff does not contend that delivery was untimely. Under the circumstances, the trial court improperly imposed post-judgment interest upon the value of the stock so delivered.

c. *Indemnification provision*

Finally, defendants complain that the trial court erred in awarding Mitzi any future damages which she or Ann's estate may incur by reason of Sam's acts, and requiring defendants to indemnify her and Ann's estate from any such liability. Defendants claim that this portion of the judgment exceeds the issues litigated by the parties and adjudicates "conjectural and premature matters" not properly before the court. As we have seen, however, the record indicates that Sam, as executor of Ann's estate, may have wrongfully claimed the federal marital deduction by concealing the existence of the oral agreement. It is possible that by reason of his acts, the taxing authorities may attempt to im-

pose penalties in the matter. Under such circumstances, the trial court, sitting in equity, had the power to "adjust all the differences between the parties arising from the cause of action in order to do complete justice and prevent further litigation, whether or not the particular relief was requested." (Sears v. Rule, 27 Cal.2d 131, 149; see Coons v. Henry, 186 Cal.App.2d 512, 519.) The trial court herein did no more than determine that Mitzi should not share responsibility for Sam's acts, retaining jurisdiction to make such further orders as may be necessary to protect her interests in the event claims are filed against either her or Ann's estate, of which she was a principal beneficiary.

The judgment is modified by striking therefrom the award of postjudgment interest upon the stocks awarded to plaintiff. As so modified, the judgment is affirmed. Plaintiff shall receive her costs on appeal.

Burke, J.

We concur:

Wright, C. J.
McComb, J.
Peters, J.
Tobriner, J.
Mosk, J.
Sullivan, J.

Modification of Opinion.

In the Supreme Court of the State of California, in Bank.

Mitzi Lee Redke, Plaintiff and Respondent, v. Abraham Silvertrust et al., Defendants and Appellants. L.A. 29886. Super. Ct. 873203.

Filed: Dec. 29, 1971.

BY THE COURT:

The opinion herein, appearing at 6 Cal.3d 94, filed November 24, 1971, is hereby modified as follows:

(1) The last two sentences of the first full paragraph appearing on page 107 are deleted, and the following substituted:

"Plaintiff asserts that defendants failed to deliver the specified stocks to her within the five-day period, thereby converting the award of stock into a money judgment upon which post-judgment interest properly could be imposed. Defendants claim, however, that pursuant to a "gentlemen's agreement" with plaintiff's counsel, defendants acted as expeditiously as possible to comply with the judgment and to deliver the stocks to the clerk of the court, that plaintiff never objected to the brief delay in depositing these stocks, and that defendants should be deemed to have substantially complied with the judgment in this respect.

"In view of the fact that resolution of the question involves matters occurring subsequent to the entry of judgment and lying outside the record, we think it appropriate that the trial court determine whether, in fact, defendants have complied with the judgment as it pertains to the delivery of the stock. As indicated above, however, in the event the trial court finds that

defendants did comply with its judgment, no post-judgment interest may be imposed upon the value of the stocks."

(2) The last paragraph appearing on page 108 is deleted, and the following substituted:

"The judgment is modified by striking therefrom the award of post-judgment interest upon any stocks found to have been delivered by defendants to plaintiff in compliance with the terms of the judgment. As so modified, the judgment is affirmed and the cause is remanded to the Los Angeles County Superior Court for further proceedings not inconsistent with this opinion. Plaintiff shall receive her costs on appeal."

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Mitzi Lee Redke, Plaintiff and Respondent, v. Abraham Silvertrust and John W. Ervin, as Executors of the Estate of Samuel Hayden, Deceased; Abraham Silvertrust and Ruth K. Allender Hayden, as Co-trustees of the Amended Samuel Hayden Trust No. 1; Ruth K. Allender Hayden; Abraham Silvertrust and Bank of America National Trust & Savings Association, as Testamentary Co-trustees under the Will of Ann Gollos Hayden, Deceased, Defendants and Appellants. 2d Civil No. 35564.

Filed: March 30, 1971.

APPEAL from a judgment of the Superior Court of Los Angeles County, Blase A. Bonpane, Judge. Modified and affirmed.

Messrs. Ervin, Cohen & Jessup, by Allan Browne, for appellants Abraham Silvertrust and Ruth K. Allender Hayden.

Messrs. O'Melveny & Myers, by Philip F. Westbrook, Jr., for appellants John W. Ervin and The Bank of America National Trust & Savings Association.

Samuel Reisman, Esq., for respondent.

Plaintiff and respondent Mitzi Lee Redke instituted this action to enforce the terms of an oral agreement allegedly made for her benefit between Samuel Hayden and Ann Hayden, both of whom are now deceased. Defendants are executors of Samuel Hayden's Estate, co-trustees of a trust created by Samuel Hayden and

testamentary co-trustees under the will of Ann Hayden. This is an appeal from a judgment in Mitzi's favor.

Ann Hayden was Mitzi's mother and Samuel was Mitzi's stepfather. The basis of Mitzi's claim was Samuel's breach of a promise made to Ann that he would, on his death, bequeath certain of Ann's separate property to Mitzi.

Samuel, a successful real estate developer, was married to his first wife Katie for almost 50 years. That marriage which ended in 1955 with the murder of Katie at the hands of a servant, produced three children and six grandchildren.

Shortly after the death of Katie, Samuel married Ann, who was herself a widow and the mother of two adult children, Mitzi, the plaintiff and respondent, and Warren, who died in 1963, and whose death apparently precipitated the dispute which now engages our attention.

It was at the height of the family's grief over the untimely death of Warren that the oral agreement between Samuel and Ann was allegedly consummated, which agreement, if given effect, would have drastically altered previously well-documented and carefully developed plans for the disposition of the estates of Samuel and Ann.

During the seven year marriage between the two, Ann's estate, as a result of Samuel's acumen and generosity, grew from an estimated $20,000 to $40,000 to over a million dollars. Approximately 7 weeks after Warren's death, Ann died. Her estate was distributed in accordance with the previously established Estate Plan. By the terms of the will, one-half of her separate property went to Samuel, the other one-half was placed in trust for the benefit of Mitzi. Thus, as a result of

her mother's marriage to Samuel. Mitzi benefited at that time to the extent of receiving approximately $680,000.00.

Some 7 weeks after Ann's death in 1963, Samuel married Ruth Allender Hayden who is a defendant in this action both in her individual capacity and as a co-trustee of an inter vivos trust created by Samuel.

When Samuel died in 1965, the disposition of his estate made no provisions for Mitzi, but instead provided for his natural children and Ruth his surviving widow, all of whom are natural objects of his bounty.

The line was thus drawn between Mitzi on the one hand seeking the additional one-half of her mother's separate property, basing her claim on the oral agreement, and the widow and the natural children on the other hand defending the integrity of the written will and trust instrument.

FACTS

The date of the critical oral agreement was February 23, 1963.

On that date it appears without question that there was in existence a will executed by Ann Hayden which together with a revocable inter vivos trust also established by her had the combined effect as follows:

(1) One-half of Ann's property would on her death go to or for the benefit of Samuel, free of death taxes.

(a) Ann's personal effects including jewelry and furs would go to Samuel outright,

(b) The rest of this one-half was to be held in marital deduction trust for the benefit of Samuel during his lifetime and Samuel was to have an unrestricted power of appointment as to the remainder.

(2) The other one-half of Ann's property was to be held in residuary trust for the benefit of Mitzi, the respondent, and her brother or their respective issue.

Samuel had prepared a similar plan naming Ann, Mitzi and Warren as beneficiaries.

This Estate Plan had been developed with the guidance and consultation of expert tax and legal advisers. One of the major factors influencing the structure of this plan was the tax benefit afforded by the so-called "marital deduction." In simple terms, this deduction provides for the elimination of Federal and State death taxes on one-half of the separate property of the first spouse to die.

The major condition necessary for realizing the benefits of this deduction is that the property be transferred to the surviving spouse with an unrestricted title or, if transferred in trust, with an unlimited power of appointment over the remainder. (26 U.S.C. § 2056; Rev. & Tax. Code, § 13805.) If Samuel's power of appointment were limited by the oral agreement, this condition would not be satisfied.

On the fateful day of February 22, 1963, Warren, Ann's son and Mitzi's brother, died from a heart attack at the age of 37 years. At that time Ann herself was critically ill with cancer. The following morning Ann was told of the tragedy. A few hours after being told of the death, Ann was visited by Mitzi.

There was testimony that, in a conversation between Ann and Samuel and overheard by Mitzi and others, Ann stated in substance that in view of the death of Warren she wished to summon the lawyers and "change my will and my trust," and "I want Mitzi to have my property, my furs, my jewels and everything

of mine." Samuel attempted to dissuade his wife from seeing the lawyers at that time. When she insisted Samuel replied, "I promise you that I'll take care of Mitzi. I'll give her everything. I'll give her your furs, jewelry, property, whatever it is. I just don't want you to worry."

There was also testimony that in this same conversation Ann stated that she wanted the share that would have gone to Warren to go to Mitzi.

Subsequently, Ann discussed amending her will and the trust instrument with both her tax and legal advisers. As a result of these discussions certain changes were made, the thrust of which was to provide for Mitzi to receive what would have been her brother's share and a concomitant reduction in the benefits which had been provided for the brother's children.

In these discussions Ann specifically indicated her interest in the tax structure and her interest in not disturbing the provisions whereby Samuel would receive one-half of her estate.[1]

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[1] Appellant Silvertrust testified to a conversation with Ann in early March of 1963, as follows:

"Q. Now, can you tell us the conversation which you had with Mrs. Hayden on this occasion at the Hayden home? A Well, she told me she wished to change or amend her trust so that what she had previously provided for her son should now go to her daughter instead. Q Her son Warren? A Her son Warren, and should go to her daughter Mitzi. She explained that her daughter's husband was rather ill and if anything should happen to herself, her daughter wouldn't have anyone else to help her as in the case of Warren's wife who still had her folks living, and she would like to have Warren's share for that reason go to Mitzi. Q Now, did you discuss the subject matter or did she ask about whether or not this change would in any way affect the interest which had been previously provided for her husband, Samuel Hayden? . . . She told me then that the purpose of her checking with me was whether or not such a change would have any bearing of what she had provided for Mr. Hayden in her trust and whether or not it would change the tax picture. She was anxious—she told me she was anxious not to disturb the situation

In March of 1963, following the discussions and the changes in the critical documents, Ann told Mitzi that the changes had been made and "You now have Warren's share."

At no time during these and other conversations, including those with Mitzi herself, did Ann mention the oral agreement with Samuel. Samuel, however, allegedly mentioned the agreement to persons who significantly were individuals other than the tax and legal advisers.

Ann died on April 5, 1963.

In the administration of Ann's estate pursuant to the will and trust instruments the marital deduction was claimed and allowed with a tax saving of approximately $178,000.00.

Subsequently, Samuel did two significant things: (1) he exercised his power of appointment over the residue of the marital deduction trust and placed it in the trust which he previously had created, and (2) he amended his trust and will eliminating provisions for Mitzi and adding benefits for his new wife Ruth as well as his natural children.

Samuel died in January 1965.

Respondent filed creditor's claims against Samuel's estate alleging the oral agreement and a separate completed gift of the furs and jewelry.

This lawsuit followed.

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where she had provided for Mr. Hayden by way of a marital tax deduction trust or giving him under which she gave him half of her property and under which she provided for $30,000 a year minimum to him. My response was that if this was the only change she is making, that it would be no effect upon Mr. Hayden's interest of it but that the overall tax would be increased somewhat because the California State tax rates would be higher somewhat by reason of the fact that there would only be one beneficiary instead of two."

THE TRIAL COURT'S FINDINGS

The trial court made voluminous findings of fact covering almost every detail at issue in the case.

A summary of the findings as they are germane to our decision is as follows: That on February 23, 1963, Samuel and Ann made an oral agreement for the benefit of Mitzi; that the purport of that agreement was that in exchange for Ann's forebearance in not changing her will and trust, Samuel promised, on his death, to leave all of Ann's property, furs and jewelry to Mitzi; that Ann fully performed her part of the agreement and relied on Samuel's promise to carry out his part of the agreement; that Ann did not abandon the agreement; that Ann had no part in choosing the method by which Samuel would perform the agreement and that because Ann had little familiarity with business transactions Samuel was the dominant influence in the management of their affairs and finally that Ann did not have any reason to suspect that Samuel would do anything illegal.

Of utmost significance is the court's choice of language in its findings relating to Ann's knowledge of the possible illegal effect of the agreement. The court found that "[I]t is *doubtful* that Ann had any particular or clear comprehension or understanding . . . of the technical aspects of a "marital deduction or an unlimited power of appointment" of the legal requirements for preserving the so-called "marital deduction." (Emphasis added.)

The trial court's conclusions of law, many of which were identical in wording to certain findings of fact, declared the oral contract to be legally enforceable and not affected by the Statute of Frauds for the reason

that all of the necessary elements of an estoppel were present. This latter conclusion flowed from other conclusions that Ann seriously and unalterably changed her position to her detriment in reliance on Sam's promise; that the appellants were unjustly enriched by Sam's breach of the agreement; and by denying enforcement of the agreement an unconscionable injury would result to Ann and Mitzi.

Finally the court concluded that by reason of tne oral agreement Samuel was during his lifetime a constructive trustee of Ann's property for the benefit of Mitzi, and that Samuel breached the agreement upon his death when he failed to leave all of Ann's property to Mitzi.

THE JUDGMENT

Appellants are ordered by the judgment to deliver to respondent certain designated stock having a total fair market value as of November 19, 1968, of $392,186.48 together with any and all dividends, stock splits, stock rights and all other increments of every nature, kind or description with interest thereon. The judgment also provides that in addition respondent is to recover from appellants the sum of $457,916.06, together with interest. This latter sum represents money received either as income on stock or proceeds from the sale of stock, and the value of the jewelry and furs and other assets no longer held by appellants. Appellants were enjoined and restrained from distributing any of the property or money held by them as constructive trustees for the use and benefit of the respondent.

CONTENTIONS ON APPEAL

Appellants, while indicating skepticism, concede that the trial court's finding as to the fact of the oral agreement is supported by evidence in the record and that on review we are bound by that finding.

They contend, however, that conceding the correctness of the court's findings as to the making of the agreement and the trial court's interpretation thereof, (1) the agreement was abandoned; (2) the agreement is unenforceable because of the Statute of Frauds, and (3) the agreement is unenforceable because it is contrary to public policy as an illegal evasion of Federal and State death taxes.

With the single exception of an attack on the finding of a separate gift of the jewelry and furs which will be dealt with later, each of appellants' remaining contentions are necessarily dependent upon our decision concerning the main issue in the case, i.e., the enforceability of the disputed oral agreement.

The often repeated maxim that an appellate court will not reweigh evidence or judge the credibility of witnesses requires that we accept the trial court's finding that the so-called "bedroom conversation of February 23, 1963" did occur. The witnesses to that conversation vary somewhat in recounting the actual words used but the trial court synthesized the various testimonies into the findings as summarized to us above.

Taking the oral contract as found[2] by the trial court we now consider appellants' contentions concerning its enforceability.

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[2]The trial court apparently rejected what appears to be an equally tenable construction, i.e., that Ann simply wanted Mitzi to have Warren's share.

It is settled law that a contract to make a particular disposition of property by will may be legally enforceable. While Civil Code section 1624(6) requires such agreements to be in writing, oral contracts of this nature are enforceable where an estoppel can be raised. (*Day v. Greene*, 59 Cal.2d 404; *Mintz v. Rowitz*, 13 Cal.App.3d 216.)

In the case at bar the trial court found that Ann had not abandoned the agreement and her failure to change her trust and will in reliance on Samuel's promise to provide for Mitzi, created an estoppel to plead the Statute of Frauds against Samuel and his heirs. Ann's failure to make these changes and her failure to inform her legal and tax advisers of the oral agreement were construed as evidence of her performance of the agreement rather than evidence that she abandoned it as appellants have contended.

The court's finding that there was no abandonment of the contract is supported by the evidence.

The legality of the agreement and the public policy to be offended by its enforcement is something else again. Under the facts of this case the claimed estoppel to plead the Statute of Frauds and the asserted illegality are so interdependent that they present a single issue.

The Statute of Frauds which is designed to prevent fraud cannot be relied on when to do so would itself work a fraud.

Thus, an estoppel may prevent reliance on the Statute. A mere change in position may be the basis of the "unconscionable injury" which must underlie estoppel to plead the Statute of Frauds.

This change of position refers to that of the contracting parties and not that of the heirs.

Thus, in *Mintz v. Rowitz, supra,* a constructive fraud sufficient to raise an estoppel was found to exist when the first spouse to die failed to make a change in her will because of reliance on the belief that mutual wills would remain in effect.

On the other hand, the basic policy underlying the Statute of Frauds is so exalted in the law that only a substantial injustice to an innocent party will prevent its invocation. The refusal to apply it must have a strong appeal to equity.

If the agreement has a tendency to work a fraud on third parties or the public, this tendency will have the effect of denying to the parties to the agreement the equitable considerations necessary to negate the application of the Statute of Frauds. In this situation, even though a party to the agreement has detrimentally altered his position in reliance thereon, it cannot be said that the resulting injury is "unconscionable."

No case has come to our attention which deals with a mixture of potential fraud on the public in the enforcement of an agreement and an estoppel to plead the Statute of Frauds based on a potential fraud on one of the parties to the agreement.

In such a situation equity and justice would seem to require that the latter yield before the former. Thus, if the oral agreement was illegal or offensive to public policy it is unenforceable both for that reason and for the reason that the Statute of Frauds applies.

Appellants' argument which we feel has merit is that to enforce the agreement is to sanction an arrangement for the disposition of property in circumvention of Federal and State tax law. If Samuel was bound by the oral agreement to give the property in question to

Mitzi, then he did not have an unlimited power of appointment and thus the marital tax deduction was not proper.

Respondent concedes that when Ann died without changing her estate plan, the marital deduction resulted in substantial but improper tax savings. However, she contends that this was the result of Samuel's wrongdoing, a result for which Ann cannot be blamed.

The trial court attempted to negate any basis for denying enforcement of the agreement because of illegality or public policy by adopting findings, the net effect of which were, that Ann had no intention to achieve any illegal result, and was not in pari delicto with Samuel.

We thus turn to an analysis of the court's findings and the evidence upon which they were based, as to the significance of Ann's partial amendment of her trust and will, her silence as to the oral agreement and ultimately her state of mind at the time of the agreement and during her subsequent conduct and silence.

The uncontroverted evidence established that Ann had received expert and explicit advice concerning the legal and tax ramifications of her estate plan at the time it was structured.

The prologue to the conversation which resulted in the oral agreement with Samuel was Ann's dramatic request to send for the lawyers so that she could effect a change in her plans. From this we can infer at least a minimal awareness of the existence of the documents involved, the provisions thereof and the need for legal advice in altering them.

When she was dissuaded from this precipitous action by Samuel's promise to "take care of Mitzi," the agree-

ment which the trial court found to have ripened at that time was, as a matter of law, freighted with the presumption that the parties knew the applicable laws and had them in mind.

". . . all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated therein, . . .". (*Swenson v. File*, 3 Cal.3d 389, 390; also see *Robertson v. Dodson*, 54 Cal.App. 2d 661, 664.)

Respondent here suggests that we equip ourselves with blinders and look only at the words spoken between the parties without reference to the existing estate plan. Her position is that the oral agreement supplanted the written documents and that since no mention was made of the terms of those documents they are irrelevant to our decision.

We cannot divorce the written estate plan from this factual setting. The sole consideration for Samuel's promise was that Ann would leave that plan unaltered.

Further uncontroverted evidence established that Ann shortly thereafter did make certain changes in her will and trust (eliminating Warren and giving his share to Mitzi) and specifically asked her advisers if these changes would affect the tax picture. She further expressed a desire not to disturb the provisions she had made for Samuel. (See footnote, *supra*.) And finally it is undisputed that she at no time told her advisers of the oral agreement.

The trial court characterized the testimony of appellants Silvertrust and Cohen, the Haydens' tax and

legal advisers to the effect that they were not told of the oral agreement, as negative and unpersuasive on the issue of whether the oral agreement was consummated. This, however, would not justify rejecting their affirmative testimony concerning conversations with Ann in which she discussed her estate plan and was told of its tax consequences. The court impliedly found that these conversations did occur.

The trial court also found that Ann did not purposely conceal the oral agreement from her advisers, a finding which cannot stand in the face of the evidence and the court's finding of no abandonment. Respondent cannot have it both ways. If Ann did not abandon the agreement then her silence under the circumstances must be viewed as active concealment of the agreement from those persons who would have been in a position to "rock the boat" if they were told of it.

Respondent can take little comfort from the trial court's finding that "it is doubtful" that Ann comprehended the legal and tax significance of her actions. This finding is simply unsatisfactory as a finding of any fact. Its weakness as a prop for respondent's position is increased by the fact that it appears to be premised upon nothing more solid that the intuition of the trial judge.

The court's preamble to this finding was that ". . . Ann was merely a housewife with little more than housewife experience." The leap from this characterization of Ann to the assumption that she was ignorant of what she was doing is too great to be made as easily as the trial court apparently did. Especially when that leap was made as the court itself said ". . . *notwithstanding any explanations that may have been offered to her* . . ." (Emphasis added.)

The very minimum knowledge with which Ann must be charged was that she alone had the power to change the documents and that if left unchanged her estate would be disposed of according to their terms. Furthermore, it cannot be argued that she was not at least aware that this plan was structured with tax advantage in mind and that this was the most compelling reason for Samuel's insistence that she maintain the status quo.

The freedom of individuals to contract enjoys a highly protected status in our law. It is elementary contract law, however, that our courts will not lend their aid to enforcement of contracts which are illegal and contrary to public policy.

The illegality, and hence of unenforceability of a contract, may be found in the consideration, the promise or the performance.

These rules are more easily stated than they are applied to a given set of facts. The term "public policy" itself defies precise definition.

Contracts which have been declared by our courts to be unenforceable run the gamut from those where parties undertake to breach a criminal statute to those which, though legal and innocent on their face, result by their performance in illegality or contravention of public policy.

At the risk of oversimplification we think it safe to say that the granting or withholding of judicial aid in the enforcement of contracts depends in large measure on the gravity of the offense to public policy and the equitable posture of the person seeking the enforcement. Mitzi who now stands in the shoes of Ann must succeed or fail according to the application of these considerations to Ann's conduct.

Evasion of taxes is an extremely serious matter for which severe criminal penalties can attach. In addition, the public has a strong interest in the integrity of the application of its tax laws. Thus where "[t]he effect of [the] agreement would be to deprive . . . the State of California and the United States government of taxes properly due . . . the agreement [is] void as against public policy. . . ." (*Kopasz v. Wymer*, 118 Cal.App.2d 119, at p. 121.)

Respondent argues that the oral agreement itself was perfectly legal and could have been performed without any fraud or evasion of taxes. The ultimate fact is that it was not so performed and it is inescapable that it was Ann who knowingly equipped Samuel with the means by which it was performed.

In any event, "'If the effect of the agreement is to accomplish an unlawful purpose, however, the agreement will be declared illegal regardless of the intention of the parties. Indeed, the mere tendency of an agreement to promote unlawful acts may render it illegal as against the policy of the law. [Citation.]'" (*Stockton Morris Etc. Co. v. Calif. Etc. Corp.*, 112 Cal. App.2d 684, 690.)

If this judgment is allowed to stand, the taxing authorities will probably be able to recoup whatever might be owing in light of the disclosures here made. (See *Estate of Sisk*, 269 Cal.App.2d 823; *Stewart v. Flournoy*, 8 Cal.App.3d 449.)

But what if Samuel had fulfilled the contract? No one would be the wiser. Herein lies the vice of enforcing the agreement.

If this court were to put its imprimatur on this agreement under these circumstances, it would be an

invitation to others to structure similar devices running only the risk of paying the taxes if the defect was discovered. Disclosure would be discouraged as well.

The refusal of such judicial aid tends to reduce the number of such agreements and in this case lend a measure of stability to the rules which guide practitioners in the field of tax law. This is the goal we seek.

Our conclusion is that this agreement is unenforceable as being against public policy.

Finally, we must examine the equities to assure that our refusal to enforce this agreement does not itself offend public policy.

Having found that Ann was to a degree in pari delicto with Samuel we find it unnecessary to measure their relative culpabilities for the reason that the ultimate equities here lie with non-enforcement. By leaving the parties where we found them we permit the bulk of the contested property to remain with the surviving widow and natural children of the person who was the original source of the wealth. In our view, a perfectly just result consistent with the latter's desires.

THE GIFT OF THE JEWELRY AND FURS

We deal with this aspect of the judgment separately because it rests on a basis distinct and apart from the oral agreement.

In addition to finding that certain jewelry and furs belonged to Mitzi as a result of the oral agreement, the trial court also found that Samuel had made a completed gift of them to Mitzi, later re-purchasing them from her but failing to deposit the purchase price to her credit as he contracted to do.

The evidence relied upon to establish the gift and resale of the jewelry and furs is found in two conversations related by Mitzi and her husband.

Mitzi testified that, within a few days after Ann's death, Samuel exhibited to her jewelry and furs belonging to Ann, stating that he wanted her to have them. Mitzi did take three of the fur pieces and then directed Samuel to give one fur piece to Warren's widow and to retain the jewelry and the rest of the furs, saying "whenever I want them I will come and get them." The second conversation, overheard by Mitzi's husband, was one in which Samuel acknowledged the gift and stated he would purchase the items from Mitzi and put the proceeds in her trust. Mitzi agreed. The jewelry was found by the trial court to include a ring which was not inventoried as Ann's property in her estate. The court valued the jewelry and furs at $76,800.00.

Appellants assert (1) that there was no completed gift because the element of delivery is lacking, (2) that the claim is barred by laches, and (3) that as to the one disputed ring, Mitzi is bound by the decree of distribution of Ann's estate, which decree did not include the ring as part of Ann's property, and which fixed the value of the jewelry at $37,915.00.

The question of whether there was a completed gift and the significance of the fact that Samuel retained physical custody of the property were questions of fact for the trial court. (See *Bank of America v. Cottrell*, 201 Cal.App.2d 361.) As a reviewing court we consider only whether there was evidence in the record to support the findings of the trial court. That support was present.

The trial court concluded that Mitzi, relying on the confidential relationship between her and her stepfather and on the oral agreement with Ann for her benefit did not learn, until after his death, of Samuel's failure to deposit money for the jewelry in the trust and thus her claim was not barred by laches.

The fact that we have found the oral agreement with Ann to be unenforceable does not prevent Mitzi's reliance upon it to the extent of avoiding the impact of laches. The trial court's finding on this point was proper.

The remaining question to be answered is whether the valuation placed upon the jewelry by the probate court in the administration of Ann's estate is binding on respondent.

The value of the jewelry fixed by the trial court in the instant action was approximately double that fixed by the probate court. The principal source of the augmentation was the disputed ring.

The trial court specifically found that that decree of distribution was not binding on respondent Mitzi Redke. Although our reasons for doing so are somewhat different from the trial court's, we also conclude that the trial court was at liberty to fix the reasonable value of the jewelry without reference to the order of the probate court.

Mitzi's claim against Samuel's estate is essentially based on a debt due her as a result of Samuel's purchase of the jewelry. In enforcing this contract of sale, which did not specify an exact purchase price, the trial court could fix the price at the fair market value of what was sold. These issues were not litigated in the probate matter and are therefore not res judicata.

"[A] decree in the course of administration is conclusive only as respects the res and the facts involved in the determination, and does not conclude further uncontested and unlitigated matters." (20 Cal.Jur.2d, § 79, p. 112.)

In view of our holding it is unnecessary to discuss the other contentions raised by the appellants.

The judgment is reduced to the sum of $76,800, plus interest at 7% per annum from January 17, 1965. All other provisions of the judgment are vacated. As so modified, the judgment is affirmed. Each party to bear his own costs on appeal.

Compton, *J.*

We concur:

Herndon, Acting *P. J.*

Fleming, *J.*

APPENDIX C.

Memorandum Opinion.

Superior Court of the State of California, for the County of Los Angeles.

Mitzi Lee Redke, Plaintiff, vs. Abraham Silvertrust and John W. Ervin, et al., Defendants. No. 873 203.

Plaintiff, Mitzi Lee Redke, the sole surviving daughter of Ann Gollos Hayden, filed this action against defendants to impress a constructive trust upon that share of her mother's separate estate, which passed through and outside of probate; and asks for the sum of One Hundred Thousand Dollars ($100,000.00) from the estate of her stepfather, Samuel Hayden. Plaintiff also asks for an accounting, injunctive and other relief.

Ann Gollos Hayden is referred to herein as Ann, and Samuel Hayden as Sam.

Both claims are based upon two alleged oral agreements: one alleged oral agreement was between Ann and Sam, whereby Sam was to leave all of Ann's separate property to plaintiff, and the other had to do with an alleged gift of jewelry and furs, from Sam to Mitzi, left to Sam under Ann's will which, plaintiff alleges, have a value of One Hundred Thousand Dollars ($100,000.00.)

Plaintiff contends that the gift of jewelry and furs was accepted by her, and that after such acceptance, the jewelry was then returned to Sam under a contemporaneous oral understanding that Sam retain the jewelry for safekeeping for the benefit of plaintiff, with a later proposal made by Sam, a few days thereafter, and agreed upon by plaintiff, that Sam be permitted to sell some of the items of jewelry on condition he pay the proceeds thereof into plaintiff's residuary trust.

The complaint prays that defendants be declared trustees for plaintiff of all Ann's separate property and requests a full accounting thereof; one cause of action asks for claim and delivery of the jewelry and furs; and two other causes of action assert claims against the estate of Samuel Hayden, deceased, which plaintiff bases upon the subject matters alleged in the first and second causes of action.

In announcing its views in this opinion, the Court sees no point in delving into a lengthy recital of historical details, particularizing by chronological reference upon each of the many exhibits, wills, codicils, trusts, amendments, transfers of funds; financial reports and numerous other items received in evidence.

This case was skillfully and vigorously tried by all counsel. Not only were most of the pertinent aspects of the case well discussed in the course of the trial; but even after counsel rested, the Court granted counsel ample opportunity for oral arguments, and counsel devoted four days to the presentation of a thorough and clear analysis of the evidence. Thereafter, additional time was granted, at the request of counsel, to prepare further Points and Authorities, which counsel filed a week after the arguments were terminated.

Among the pertinent facts and circumstances, which constitute the evidence in this case, are these:

On May 15, 1955, Samuel Hayden, then a widower, married the widow, Ann Gollos. Ann was 50 years old, a housewife who, according to the evidence, had not engaged in and had little or no familiarity with business transactions. Sam was then approximately 73 years old. He was skilled in business, financially well off and, according to general consensus, was a repu-

table man of affairs, with three adult children. At the time of this marriage, Ann's net worth was estimated between Twenty-to-Forty Thousand Dollars ($20,000-to-$40,000). She had two children, a daughter, who is the plaintiff herein, and a son, Warren William Gollos, referred to hereafter as Warren. Neither of the children resided with Sam and Ann at any time during their marriage.

It appears that Sam was a keen and successful businessman, a real estate developer, and an investor in a variety of enterprises. In his business endeavors, he had acquired considerable knowledge, albeit in a practical sense, with respect to income and estate tax laws and had the benefit of the advice and counsel of capable and learned lawyers and of experts in accounting and tax matters. Sam was able to build up Ann's separate property from the modest sum of about Forty Thousand Dollars ($40,000.00), as mentioned above, into a separate estate having a value of approximately a million dollars, at the time of her death.

The evidence discloses that Sam and Ann kept their estates carefully segregated; that a number of wills, codicils, trusts and amendments were executed, from time to time, by both Sam and Ann, although during Ann's lifetime the dispositive clauses remained substantially the same.

On or about July 15, 1960, Ann executed a will providing, among other things, for a so-called marital deduction trust, for the benefit of Sam, to the maximum extent permissible to qualify under the Federal Estate Tax laws, and pursuant thereto, Sam was given unrestricted, general power of appointment. The rest of her estate was to go into a residuary trust for the benefit of plaintiff and her brother, Warren.

It appears that Ann was concerned about protecting Sam, to the extent that under the provisions of the marital deduction trust, he was to receive a net income therefrom of Thirty Thousand Dollars ($30,000.00) per year, and any deficiency was to be paid out of the residuary trust created for the benefit of Ann's two children. Under the residuary trust, distributions of the corpus were to be made when Ann's children, Mitzi and Warren, respectively, reached the ages of 40, 50 and 60. At the end of the trust period, fifty percent (50%) of the trust went to Mitzi, and fifty percent (50%) went to Warren. On November 9, 1961, a codicil was executed by Ann, which had only the effect of naming Leonard Cohen as consultant and the law firm of Cohen and Jessup as attorneys in the probate of her estate; otherwise, the codicil expressly republished Ann's will of July 15, 1960.

On or about December 3, 1962, Ann executed an inter vivos trust, referred to as Ann's Trust No. 1, which became the repository of most of her property. Said trust also contained provisions for a marital deduction trust for Sam's benefit, with unrestricted power of appointment, including the aforementioned provision which assured Sam an income of not less than Thirty Thousand Dollars ($30,000.00) per year. Trust No. 1 also had a residuary trust for the benefit of Ann's two children, Mitzi and Warren. By an addendum, on January 30, 1963, Ann transferred to said trust a substantial amount of stocks owned by her.

On February 23, 1963, a poignant event of moment and consequence occurred, which, as matters developed, appeared to have had a dramatic and crucial impact upon the status of the dispositive plans. On that date, Ann's son, Warren, died. Warren was a young

man, who died suddenly and unexpectedly from a heart attack.

It is of interest to note, that on December 3, 1962, Sam's testamentary plans were similar to Ann's, and were contained in his will dated July 15, 1960, and in his inter vivos trust, referred to as Samuel Hayden Trust No. 1, executed July 31, 1962. As with Ann's dispositive plans, Sam too had a marital deduction trust for Ann, with an unlimited power of appointment and with Mitzi and Warren designated as successor beneficiaries, if Ann did not exercise her power of appointment. Similarly, Sam also gave the other half of his trust estate to Mitzi and Warren.

So, here, as the evidence shows, we have two dispositive plans: one by Ann and the other by Sam, both, practically speaking, running parallel, so that when Ann died, all of the estate in Trust No. 2 was subject to appointment by Sam, and upon his failing to appoint, it would go to Mitzi and Warren; likewise, if Sam survived Ann, upon Sam's death, all of his estate would go to Mitzi and Warren, as the practical effect of his testamentary plan and inter vivos trust.

It was on February 23, 1963, after the news of Warren's death, that the events are alleged to have occurred, which eventually culminated in forming the basis of this litigation. It is asserted by plaintiff, that on the above date, after Ann had been informed of Warren's death by Dr. Mills and plaintiff's husband, Stanley, Mitzi and a friend of hers, Mrs. Eudelle Siegel, came to the house to console Ann on Warren's death. They testified that they met Ann in her bedroom and that also present, at that time, were Sam and a registered nurse, Mary Snyder, who was employed

in the home. Plaintiff asserts that in the midst of a mournful concert of tearful laments and expressions of grief, over Warren's sudden and unexpected death, a crucial conversation took place in Ann's bedroom between Ann and Sam. According to plaintiff and her witnesses, Ann turned to Sam at this time and exclaimed that she wanted to change her will and trust to eliminate Warren therefrom and to leave all of her separate property, including her jewels and furs, to Mitzi. According to Mitzi, Ann requested Sam, in a spirit of urgency, to call the lawyers and have them immediately come to the house, so that she could make this change; that Sam objected to Ann calling the lawyers, saying it was not necessary to call the lawyers, and he promised Ann that he would leave everything to Mitzi and see that Mitzi got all of Ann's property; that during this conversation, Ann repeated her request, and she continued to receive promises from Sam that he would see that Mitzi got all of Ann's property, reassuring Ann that it was not necessary for her to make any changes to bring this about; that relying upon these repeated promises made by Sam, Ann did not make this major change in her existing testamentary plan.

Plaintiff further contends that, as a means of carrying out his promise to Ann, Sam not only caused Ann to execute an amendment to her trust on March 15, 1963, eliminating Warren as beneficiary and leaving Mitzi as the sole successor beneficiary, but in addition, some ten days later, on March 26, 1963, he saw to it that all of Ann's remaining assets were put in her trust, except for a few assets, which could not be administered under the trust.

Plaintiff asserts that this transfer by Sam was made for the specific reason of carrying out his promise to Ann, and to see that all of Ann's separate property would go to Mitzi, by Sam deciding not to exercise his power of appointment under Ann's Trust No. 2.

Plaintiff further asserts that between March 25 and March 29, 1963, after Ann had returned unconscious to Mt. Sinai Hospital, and prior to her death, Sam, through the exercise of his power of attorney, caused a transfer of a Hundred Thousand Dollars ($100,000.00) of Ann's money to be made to Mitzi, by having it appear that this was a loan to A. R. Gollos, as an expedient to save death tax. Gollos testified that he had been persuaded by Sam to make a gift of that amount to Mitzi, stating that although he was short of funds, nevertheless, at the urging of Sam, he agreed to make the gift and gave two notes of Fifty Thousand Dollars ($50,000.00) each, carrying interest at five percent (5%) and that these notes were deposited in Ann's Trust No. 1, as evidence of his indebtedness.

Plaintiff, however, completely rejects this contention and asserts that there's no truth to Gollos' testimony that this was a gift, but that this was a plan by which Sam had already started, pursuant to his promise to Ann, to transfer property from Ann's Trust to plaintiff personally, prior to Ann's death, for the purpose of saving on death taxes.

On April 2, 1963, as was done shortly prior thereto, by Ann, Sam proceeded to execute an amendment to his trust, identical to the one executed by Ann on March 15, 1963, by which Sam eliminated Warren as the beneficiary, leaving his share of Sam's estate to Mitzi, in the Samuel Hayden Trust No. 1.

The above was the state of testamentary plans, as having been established by husband and wife, prior to Ann's death on April 5, 1963. The plans remained that way until another event of moment and consequence took place in May 1963. After rejecting a short-lived engagement to one, Belle Levy, within two weeks after Ann's death, Sam met Ruth Allender, whom he married on May 29, 1963.

It is to be observed, at this juncture, for what light it might shed on the matter of the alleged oral agreement between Sam and Ann, after Warren's death, that had Sam Hayden died before his marriage to Ruth Allender on May 29, 1963, then not only everything in Ann's Trust No. 2 would have gone to Mitzi, but in addition, the major part of all of Sam Hayden's estate, as provided in his will and trusts, would likewise have gone to Mitzi, as he had not proceeded to exercise his power of appointment under Ann's Trust No. 2.

Sam's engagement and marriage to Ruth Allender, according to plaintiff, brought about a marked testamentary dislocation in Sam Hayden's dispositive plans. After Sam's engagement to Ruth, Sam instructed attorney Cohen to prepare an antenuptual agreement between himself and Ruth, which was signed on May 27, 1963, in which Sam bound himself to devise a most substantial share of his estate, in addition to his interest in the residence at 400 Robert Lane, Beverly Hills, California, to Ruth. Before the signing of this antenuptual agreement, Sam instructed Cohen to amend the Samuel Hayden Trust and his will to conform to the aforementioned antenuptual agreement with Ruth. On May 23, 1963, he amended the Samuel Hayden Trust No. 1 and now completely eliminated Mitzi, substituting therein a marital deduction trust for one-third (1/3) of his

estate to Ruth, and the balance to be divided in two (2) equal trusts: one for Rose, and the other for Barney, two of Sam's children, and no provision whatever was made for Mitzi. Later, Sam increased Ruth's marital deduction trust to one-half (½) of his estate.

On June 3, 1963, right after Sam married Ruth on May 29, 1963, Sam executed a new will, again completely eliminating Mitzi. In this will, and not until June 3, 1963, Sam, for the first time, declared his intention to exercise, and did exercise, all of the testamentary powers of appointment he possessed under the provisions of Ann Trust No. 2, dated December 3, 1962, and under Ann's will, in favor of the trustees of the Samuel Hayden Trust, in conformance with Sam's amendment of May 23, 1963.

The effect of these instruments, according to plaintiff, was to completely eliminate Mitzi from Sam's testamentary plans, to breach the oral agreement he made with his now deceased wife, Ann, and to transfer Ann's separate estate to Sam's third wife, Ruth, and to Rose and Barney, Sam's two children by his first marriage, contrary to Sam's promise to leave all Ann's separate property to Mitzi. Thereafter, although Sam made several other amendments to his trust and will, he never again mentioned Mitzi as a beneficiary.

Plaintiff testified that until Sam's death on January 17, 1965, she knew nothing about any of the changes that Sam had made in his trust and will, wherein he had completely eliminated her as a beneficiary.

Plaintiff contends that after the funeral arrangements on April 6, 1963, Mitzi, her husband Stanley and Sam gathered in Sam's den, and Sam reminded Mitzi of his previous promise to his deceased wife Ann,

whereby he was to leave Mitzi all of her mother's separate property, jewels and furs, and Sam handed all the jewelry to Mitzi. Plaintiff testified that she accepted the gifts, but turned them back to Sam for safekeeping, because, being upset, she preferred to take them some time later, adding that she had no place to keep them; that about ten days later, Mitzi and her friend, Mrs. Eudelle Siegel, went to pick up Ann's clothing and furs, when Sam met them and showed Mitzi and Mrs. Siegel all Ann's jewels and again asked Mitzi to take them with her, commenting that the jewels were worth a Hundred Thousand Dollars ($100,000.00); but, Mitzi expressed fear about taking them home and asked Sam to keep them for her, which, according to plaintiff, Sam agreed to do; that during this conversation, Sam offered to sell some of the jewels for Mitzi, and Mitzi agreed that they be sold, as she would rather have the money. Mitzi testified, that at this time, she took some of Ann's dresses and shoes and also three of her mother's five fur pieces, which Sam had given her: a beaver jacket, a mink jacket and a mink stole, leaving with Sam, for storage and safekeeping, her mother's mink coat and an additional stole; which she stated she asked Sam to give to her sister-in-law, Martha Göllos.

Perhaps it should be mentioned in this connection, that a serious dispute arose between the parties to this action, as to whether Ann's jewelry, after her death, contained what has been referred to throughout the trial as a pear-shaped, 7.49 carat, platinum-mounted diamond ring. While Mitzi contends that her mother wore this ring for a considerable time and owned it at the time of her death, and is supported in her contention by the testimony of Silvia B. Meitus, the de-

fendants strongly deny this fact, with Ruth alleging that Sam, at the time of their engagement, went with her to Braun Brother's Jewelers and purchased the ring as her present.

Plaintiff, through her counsel, argues vigorously and with emphasis upon the fact that the oral agreements between Sam and Ann, to turn over all of Ann's separate property to her daughter, Mitzi; is clear and convincing; that it is amply supported, not only by the testimony of the plaintiff herself, but by her husband Stanley Redke and disinterested witnesses, such as: Lillian Small, Phil Malkin, Elaine Benedict and Mary Nathan Snyder.

In addition, plaintiff argues that all of the surrounding circumstances, the conduct of the parties, and Ann's and Sam's faith and trust demonstrated toward each other, as to the disposition of their respective estates, are clearly supportive of the fact that both husband and wife believed and understood that at least the mother's separate estate was, without question, to go to her daughter, Mitzi.

Plaintiff reasons that the identicity of the dispositive plans, established by Ann and Sam, is significant; that the reason that no substantial modification was made in the wills and trusts to carry out the oral agreement was that the plan, as devised by Sam, was considered by him to be a proper and expedient plan by which to carry out Ann's wishes; that there appeared to be a mutual sense of faith and trust between Ann and Sam, as to the disposing of their estates, and that this found expression in the fact that the two plans, executed by the husband and wife, were analogous; that in these circumstances, Ann had ample reason to believe Sam

would carry out her wishes to turn over all of her separate property to Mitzi, while Sam saw no need to modify the wills and trusts, when he knew he could perform his promise, in his own way, by simply letting matters stand as they were.

The defendants, however, counter by saying, if Ann entered into an agreement with Sam, which limited Sam's power of appointment, in the marital deduction, this impinged upon State and Federal Revenue Codes, which provide against all such restrictions, and that this agreement, therefore, with the condition attached, was rendered illegal and unenforceable.

In this connection, it is the Court's view that the evidence fails to establish that Ann had any part in choosing the method by which her will was to be carried out, or that she had any particular knowledge of the technical aspects of a marital deduction. Sam, with his admittedly dominant personality, was the mastermind in the management of all business and legal affairs and in the choice of lawyers and consultants. Ann was merely a housewife, with little more than ordinary housewife experience. Nothing in the evidence indicates that she was not in good faith in reposing trust in her husband, or that she had reason to suspect there was anything illegal or irregular in the method that her husband, with his reputed honesty and reliability, would choose to employ to carry out her wishes. Under the conditions here, it can certainly be said that there was an implied covenant of good faith and fair dealing that neither party would do anything to injure the rights of the other to receive the benefits of the agreement. The agreement that Ann had called upon her husband to carry out did not require the parties to do

anything illegal in performing it. The Court is of the opinion that Ann was in good faith. If Sam, in performing the agreement, acted contrary to certain legal technicalities, this would not involve Ann to the extent of vitiating the agreement.

Ann performed her part of the agreement by not launching out to call the lawyers to make changes of her own initiative in her dispositive plan, when her husband assured her that it was not necessary to call the lawyers, and that he would carry out her wishes; although, after her death, her husband, according to plaintiff, changed his will and trust and thereby breached his promise to turn over Ann's estate to Mitzi.

Plaintiff also points out, that if there had been no agreement to turn over Ann's separate property to Mitzi, why did Sam manifest such urgent concern to require A. R. Gollos immediately to make a gift of One Hundred Thousand Dollars ($100,000.00) to Mitzi, just before Ann's death, and at a time when Gollos, according to his own testimony, was without funds, and when, in order to make the gift, he had to borrow the money through Sam, from Ann's estate. If this gift was based purely upon Gollos' generosity, why did Gollos require that Sam become responsible for the payment of the gift tax?

Here again, plaintiff argues that Sam was merely using this method to transfer One Hundred Thousand Dollars ($100,000.00) to Mitizi, under the pretext of a gift, with the intent purpose of furthering part of his agreement with Ann, before Ann's death, in order to save death taxes, as saving taxes was a matter of concern to Sam, when this was possible.

Be that as it may, the Court does not place the least credence in Gollos' story, that he was persuaded by Sam to make a gift to Mitzi, in the handsome sum of One Hundred Thousand Dollars ($100,000.00), when he had to borrow all of that money to do it. Under these circumstances, without more satisfactory explanatory proof, such consummate generosity, on the part of A. R. Gollos, is incredible. Whatever Sam's motive was in resorting to this method of transferring One Hundred Thousand Dollars ($100,000.00) from Ann's Trust No. 1, it appears to the Court that this was merely an expedient to transfer that sum of money to the transferee, who ultimately was entitled to receive it, and the Court cannot help feeling that Sam hoped to achieve some particular benefit from the strange and circuitous course which he pursued in effecting this transfer.

Gollos admitted having dated Sam's widow Ruth, after Gollos' own sister, Sam's wife, had died. Just how impartial this relationship with Ruth Hayden would render Gollos' testimony in this action is hard to tell, considering that Ruth would stand to profit quite substantially from a favorable result of this trial.

It would seem, that before her death, Ann had reason to have faith and trust not only that, under the oral agreement, all of her separate property would go to Mitzi, but that Sam's property, as well, would go to Mitzi. And, this is exactly what would have happened had Sam died, before he married Ruth Allender on May 29, 1963.

Against this seemingly serene and stable atmosphere of mutual understanding, with respect to their dispositive plans, it is not difficult to accept plaintiff's proof

that an express agreement was had between the parties with Ann reposing faith and trust in Sam's promise that all of Ann's separate property was to go to her only daughter, Mitzi.

The Court is satisfied that plaintiff's witnesses, who testified to the oral agreement, testified truthfully, and that the negative testimony offered by defendants to the effect that none of Sam's consultants had been made aware of this agreement, falls far short from having the force to overthrow the positive testimony of the witnesses, who were present at the time of the agreement and heard what actually took place. In fact, some evidence did disclose that not in every case did Sam consult with his advisers, and it was brought out by testimony that several significant matters came up, in the course of Sam's affairs, which Sam had not seen fit to divulge to his advisers.

Sam Hayden was referred to by most witnesses as a man of integrity, or compassion and reliability. Perhaps he was all of these. But, how do we account for his apparent manipulation of the Hundred Thousand Dollars ($100,000.00) which he transferred from Ann's trust, just before her death, ostensibly as a loan to A. R. Gollos, who testified to the absurd and improbable story that he was persuaded by Sam to borrow this money, so that Gollos could make a gift of that amount to Mitzi, and that the gift was to be made now, even though, as Gollos testified, he was so short of funds that he had to borrow the entire amount from Sam, and as evidence of that debt, he gave notes that were deposited in Ann's trust, bearing interest at five percent (5%). Then, too, this octogenarian, who was suffering from heart disease and cancer, in less than

a fortnight, after the death of his wife, announced his intention to marry one, Belle Levy. For reasons that are not clear, he did not marry Belle and quickly centered his attentions on Ruth Allender.

Interestingly enough, it appears that Ruth Allender's emergence on the Hayden scene, was coincidental with Sam's total transformation of his dispositive plan. It was at this time that Sam proceeded to take steps to discard his existing trust and will and completely obliterated Mitzi therefrom. He then exercised his power of appointment, taking into his own trust all of the assets in Ann's Trust No. 2, and reconstructed entirely different testamentary plans, which bore no resemblance to former plans and were, in fact, in total contravention to the oral agreement entered into with Ann, for the benefit of Mitzi. The effect of this change was that Mitzi, who stood to take everything from Sam before he married Ruth, now stood to take nothing.

The Court is aware of the fact that except for the existence of the oral agreement, which affected the disposition of Ann's separate property, Sam did have the right and power to make any changes he wished to make in his testamentary plans.

However, in the light of all the circumstances, there appears to be no good reason to stamp plaintiff's testimony and that of her witnesses as not worthy of belief, and the Court is convinced, from the evidence, that Sam and Ann did enter into the oral agreement, which forms the basis of this action.

It is to be noted that plaintiff makes only two claims in this action: the first for her mother's separate estate, pursuant to the oral agreement between Sam and her

mother; and the second is for her mother's jewelry and furs, which plaintiff says she received from Sam as a gift, or that she be paid a price therefor, if the jewelry and furs are not available.

As to plaintiff's first claim, the Court is of the opinion that Ann reached a sort of mental crisis after Warren's death, bringing dramatically to mental focus the problems that beset her, concluding that the thing to do, at this critical moment, was to arrange matters so that in the event of her death all her separate property would go to Mitzi. Ann knew that Warren died unexpectedly; that she herself was seriously ill; that Sam, who was now 81 years of age, had heart disease, had suffered a stroke and was afflicted with a prostate cancer. Ann knew, also, that Mitzi's husband had recently gone through a cancer operation, and that if he died, Mitzi would have no one to care for her and their four children. At the same time, Ann could well have reasoned that since Sam was a wealthy man in his own right, with an added income of Thirty Thousand Dollars ($30,000.00) per year from Ann's Trust No. 2, he was well able to provide for any member of his own family, from his own personal estate, if that became his wish. It seems logical, therefore, that Ann should take steps in these circumstances to protect Mitzi and her family, and to this end, she entered into the hereinmentioned oral agreement with Sam.

As to Mitzi's second claim, the Court is also of the opinion that Sam did make a gift of all Ann's jewelry to Mitzi the day after her mother's death, by having physically delivered the jewelry to Mitzi at that time, and that the jewelry included the pear-shaped, 7.49 carat, platinum-mounted diamond ring, which Ruth maintains was purchased for her by Sam after Ann's

death. The Court believes that the pear-shaped, 7.49 carat, platinum-mounted diamond ring was, for several years, owned and worn by Ann up to the time of her death.

It would seem that Mitzi and her husband were certainly in a position to testify from personal knowledge regarding this ring and its identity, as they visited with Ann most frequently and had full opportunity to notice it, particularly on special occasions, such as the wedding party described by Stanley on November 18, 1962; and it is reasonable to assume that mother and daughter would discuss the type of jewelry that Ann wore and would certainly discuss a gem of such unique caliber.

Moreover, their testimony was supported by Mrs. Sylvia Meitus, who was Ann's longtime friend. After Ann came to Los Angeles, from Chicago, Mrs. Meitus saw her very often, over a period of several years. Mrs. Meitus testified that she went out with Ann socially and to club affairs and had many opportunities to observe the pear-shaped diamond ring on Ann's left hand. She proceeded to describe it by mentioning, among other things, that it was about two carats less than the 9 carat diamond that she wore, while testifying on the witness stand. The Court was impressed with this witness and by the clear and convincing character of her testimony. It is reasonable to assume, from her own social standard, that she would show an interest in the attractive jewelry worn by her friend Ann and especially observe the rare features which characterize pear-shaped diamonds.

It was very likely, that right after his wife died, Sam felt there was no one who had a better right to the

jewelry and furs than his deceased wife's daughter, Mitzi. It is also probable that as time passed and his desire for a new wife gained fervence, he may have had a second thought regarding the jewelry, and so he proposed to Mitzi that she allow him to buy or sell some of the jewelry and deposit the purchase price in her trust. Mitzi consented to this arrangement. Although the gift was completed as of April 6, 1963; Sam, as of the time of his death on January 17, 1965, had not accounted to Mitzi for her jewelry, or deposited the proceeds of any purchases or sales in her trust.

As previously stated in this opinion, the Court has not meant to go into a recital of every relevant item of testimony taken into account in this memorandum. Neither does the Court believe that it would serve any purpose to document this memorandum with legal authorities. Counsel argued the law throughout the trial and made frequent references to judicial decisions, which the Court had the opportunity to examine and has taken them into account in arriving at this decision. The Court does not vouch for the absolute accuracy of all data herein referred to, and it may well be that some items could stand correction. If this be so, any material corrections or deficiencies in this memorandum may be supplied by the Court at the time of the drafting of the Findings of Fact, Conclusions of Law and Judgment. In this memorandum, the Court has merely intended to refer to some of the salient factors which entered into the Court's consideration in reaching this decision.

The Court has diligently examined the pertinent documents, among nearly 200 exhibits received in evidence, and has made a painstaking analysis of the

facts and circumstances as adduced from the witnesses. All briefs and Points and Authorities, submitted by counsel, have been carefully studied, and the decisions therein cited have been examined. Close attention was given by the Court to counsels' oral arguments, which were most capably presented by both sides, over a four-day period and, further, the Court has examined additional Points and Authorities, which were furnished by counsel, after arguments. After having conscientiously scrutinized all the evidence, both oral and documentary, and the law applicable thereto, the Court has concluded that the proof established on behalf of plaintiff, viewed in the light of the relevant circumstances, is clear and convincing that an oral agreement was in fact effectuated between Ann and Sam, whereby Sam was to turn over all of Ann's separate estate to Mitzi. The Court believes that the method by which this was to be accomplished was, in good faith, left by Ann entirely to the discretion of her husband, and there is nothing in the evidence to indicate that Ann suspected or had reason to suspect that the agreement her husband was to carry out required him to do anything illegal, or that Sam, in any circumstances, would break faith by not pursuing a legally acceptable procedure which would assure the performance of the agreement.

The Court recognizes that by the very nature of an agreement of this kind, where death has removed the parties from the scene, the testimony of the living cannot easily be controverted. So, the Court kept particularly alert throughout the trial for any telling circumstance or situation, disclosed by the evidence, which would tend to shed the light upon the truth. But, after

taking all the evidence into account, accepting the credible and rejecting the incredible, and with the help that was furnished to the Court by counsel, in their arguments and briefs, the total effect thereof was to create a clear and convincing conviction, in the mind of the Court, of the validity of plaintiff's contention with respect to the oral agreement between Ann and Sam, and the gifts of jewelry and furs made to Mitzi by Sam, after her mother's death.

The Court, therefore, finds in behalf of plaintiff and against defendants on the first, second, third and fourth causes of action of the complaint.

The Court has purposely omitted to set forth in this opinion an enumeration of all the securities, cash, real estate and other items of property, which constituted Ann's separate estate, at the time of her death, or the total amount thereof in terms of monetary value, at the time of Sam's death. The Court trusts that a reasonable determination of all such items of property and their respective values may be arrived at by stipulation of counsel, upon the basis of an accurate audit, study and report furnished by a competent firm of Public Accountants. If Counsel shall be unable to arrive at a fair determination of all such items and figures, within ten days from the date of this opinion, the Court will make its own determination of the fair market value thereof, based upon the proof adduced at the trial, and the Court shall insert the same in the Findings of Fact, Conclusions of Law and Judgment in this case.

The Court hereby makes its ruling on the following specific items of property:

1. The Court rejects the item of Sixty Three Thousand Five Dollars and Forty Six Cents ($63,005.46), which plaintiff claims constituted improper distributions of income and principal to Sam Hayden. It is the Court's view that such contributions to Sam were authorized under Ann's Trust No. 1, and this item is, therefore, disallowed.

2. The Court has found the fair market value of all the jewelry, including the pear-shaped, 7.49 carat, platinum-mounted diamond ring, was the amount of Seventy Five Thousand Dollars ($75,000.00), as of the date of Sam Hayden's death; and that the fair market value of the pear-shaped, 7.49 carat, platinum-mounted diamond ring, contained therein, is found by the Court to be Twenty Three Thousand Dollars ($23,000.00), as of said date.

3. The Court finds the furs to have a fair market value of Eighteen Hundred Dollars ($1,800.00), as of Sam's death.

4. Plaintiff shall have judgment in her favor and against the defendants in the above total sum of Seventy Six Thousand, Eight Hundred Dollars ($76,800.00), plus any and all other sums that shall have been ordered, as part of the ultimate judgment, upon final determination of all the cash, securities, real estate and other property that constituted Ann's separate property; and that except for the property that shall have

been returned in kind to plaintiff, along with any and all income, interest and dividends derived therefrom by defendants, the plaintiff shall have interest on all said amounts included in the final judgment, from January 17, 1965, until the date of said judgment.

5. Defendants to pay cost of suit.

6. Counsel for plaintiff is directed to prepare Findings of Fact, Conclusions of Law and Judgment in accordance with the views of the Court, above expressed.

Dated: October 30, 1968.

/s/ Blase A. Bonpane
JUDGE

APPENDIX D.

26 USC §2056. Bequests, etc., to Surviving Spouse.

(a) *Allowance of marital deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the case of life estate or other terminable interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(2) *Interest in unidentified assets.*—Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall, for purposes of subsection (a), be reduced by the aggregate value of such particular assets.

(3) *Interest of spouse conditional on survival for limited period.*—For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

(4) *Valuation of interest passing to surviving spouse.*—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint

any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(6) *Life insurance or annuity payments with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent consisting of proceeds under a life insurance, endowment, or annuity contract, if under the terms of the contract such proceeds are payable in installments or are held by the insurer subject to an agreement to pay interest thereon (whether the proceeds, on the termination of any interest payments, are payable in a lump sum or in annual or more frequent installments), and such installment or interest payments are payable annually or at more frequent intervals, commencing not later than 13 months after the decedent's death, and all amounts, or a specific portion of all such amounts, payable during the life of the surviving spouse are payable only to such spouse, and such spouse has the power to appoint all

amounts, or such specific portion, payable under such contract (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), with no power in any other person to appoint such amounts to any person other than the surviving spouse—

(A) such amounts shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of such amounts shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if, under the terms of the contract, such power in the surviving spouse to appoint such amounts, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(c) *Limitation on aggregate of deductions.*—

(1) *General rule.*—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2).

(2) *Computation of adjusted gross estate.*—

(A) *General rule.*—Except as provided in subparagraph (B) of this paragraph, the adjusted gross estate shall, for purposes of subsection (c)(1), be computed by subtracting from the entire value of the gross estate the aggre-

gate amount of the deductions allowed by sections 2053 and 2054.

(B) Special rule in cases involving community property.—If the decedent and his surviving spouse at any time, held property as community property under the law of any State, Territory, or possession of the United States, or of any foreign country, then the adjusted gross estate shall, for purposes of subsection (c)(1), be determined by subtracting from the entire value of the gross estate the sum of—

(i) the value of property which is at the time of the death of the decedent held as such community property; and

(ii) the value of property transferred by the decedent during his life, if at the time of such transfer the property was held as such community property; and

(iii) the amount receivable as insurance under policies on the life of the decedent, to the extent purchased with premiums or other consideration paid out of property held as such community property; and

(iv) an amount which bears the same ratio to the aggregate of the deductions allowed under sections 2053 and 2054 which the value of the property included in the gross estate, diminished by the amount subtracted under clauses (i), (ii), (iii) of this subparagraph, bears to the entire value of the gross estate.

For purposes of clauses (i), (ii), and (iii), community property (except property which is

considered as community property solely by reason of the provisions of subparagraph (C) of this paragraph) shall be considered as not "held as such community property" as of any moment of time, if, in case of the death of the decedent at such moment, such property (and not merely one-half thereof) would be or would have been includible in determining the value of his gross estate without regard to the provisions of section 402 (b) of the Revenue Act of 1942. The amount to be subtracted under clauses (i), (ii), or (iii) shall not exceed the value of the interest in the property described therein which is included in determining the value of the gross estate.

(C) *Community property—conversion into separate property.*—

(i) *After December 31, 1941.*—If after December 31, 1941, property held as such community property (unless considered by reason of subparagraph (B) of this paragraph as not so held) was by the decedent and the surviving spouse converted, by one transaction or a series of transactions, into separate property of the decedent and his spouse (including any form of coownership by them), the separate property so acquired by the decedent and any property acquired at any time by the decedent in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of clauses (i), (ii), and (iii) of subparagraph (B), be considered as "held as such community property."

(ii) *Limitation.*—Where the value (at the time of such conversion) of the separate property so acquired by the decedent exceeded the value (at such time) of the separate property so acquired by the decedent's spouse, the rule in clause (i) shall be applied only with respect to the same portion of such separate property of the decedent as the portion which the value (as of such time) of such separate property so acquired by the decedent's spouse is of the value (as of such time) of the separate property so acquired by the decedent.

(d) *Disclaimers.*—

(1) *By surviving spouse.*—If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

(2) *By any other person.*—If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then—

(A) if the disclaimer of such interest is made by such person before the date prescribed for

the filing of the estate tax return and if such person does not accept such interest before making the disclaimer, such interest shall, for purposes of this section, be considered as passing from the decedent to the surviving spouse, and

(B) if subparagraph (A) does not apply, such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

(c) *Definition.*—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person

takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b) (1), be considered as passing from the decedent to a person other than the surviving spouse. Aug. 16, 1954, c. 736, 68A Stat. 392; Oct. 4, 1966, Pub.L. 89-621, § 1 (a), 80 Stat. 872. (Emphasis added).

APPENDIX E.

U.S. Treas. Estate Tax Reg. §2056(b)-5(g)(2).

(2) The power of the surviving spouse must be a power to appoint the entire interest or a specific portion of it as *unqualified owner* (and free of the trust if a trust is involved, or free of the joint tenancy if a joint tenancy is involved) or to appoint the entire interest or a specific portion of it as a part of her estate (and free of the trust if a trust is involved), *that is, in effect, to dispose of it to whomsoever she pleases.* Thus, if the decedent devised property to a son and the surviving spouse as joint tenants with right of survivorship and under local law the surviving spouse has a power of severance exercisable without consent of the other joint tenant, and by exercising this power could acquire a one-half interest in the property as a tenant in common, her power of severance will satisfy the condition set forth in paragraph (a)(3) of this section that she have a power of appointment in favor of herself or her estate. *However, if the surviving spouse entered into a binding agreement with the decedent to exercise the power only in favor of their issue, that condition is not met.* An interest passing in trust will not be regarded as failing to satisfy the condition merely because takers in default of the surviving spouse's exercise of the power are designated by the decedent. The decedent may provide that, in default of exercise of the power, the trust shall continue for an additional period. (Emphasis added).

APPENDIX F.

U.S. Treas. Estate Tax Reg. §2056(e)-2(a)(5).

(5) In case of a controversy involving the decedent's will, see paragraph (d) of this section.

A property interest is considered as passing to the surviving spouse only if it passed to her as beneficial owner, except to the extent otherwise provided in §§ 20.2056(b)-5 and 20.2056(b)-6 in the case of certain life estates and insurance and annuity contracts with powers of appointment. For this purpose, where a property interest passed from the decedent in trust, such interest is considered to have passed from him to his surviving spouse to the extent of her beneficial interest therein. The deduction may not be taken with respect to a property interest which passed to such spouse merely as trustee, *or subject to a binding agreement by the spouse to dispose of the interest in favor of a third person.* An allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. In determining whether or not such an interest is deductible, however, see generally the terminable interest rules of § 20.2056(b)-1 and especially example (8) of paragraph (g) of that section. (Emphasis added).

APPENDIX G.

[ERVIN] *I have had the question raised with me before, not in a fraud context by clients, but in a context of whether it is legal or illegal or enforceable or unenforceable.*

And I have told them that any attempted restriction, oral or written, on the marital deduction, would be—I put it to them very simply. *I just tell them that it is unlawful, and that it would not only destroy the marital deduction but they should not even consider doing it because I don't think that the agreement would be enforceable.* (Emphasis added: 15 RT 3739.)

MR. WESTBROOK: *If there was a fraud, it is because the agreement was ever made, your Honor. That would be a fraud on the government.* (Emphasis added; 15 RT 3736.)

[ERVIN] THE WITNESS: Excuse me, your Honor. If I—just as the executor, on a liability problem, if the parties or either of them were guilty of tax fraud, the rights of the Federal Government and the State Government, I think, would be paramount to anyone else in a particular matter, paramount to the plaintiff's constructive trust argument. . . ." [15 RT 3728-29.]

[WESTBROOK] Your Honor, returning to plaintiff's theory of the case now, which is that there is a fraudulent plan or scheme, the Court asked plaintiff's counsel the other day, "Wouldn't that be illegal?" The answer wasn't quite clear to me and it had something to do with, "Well, no, not if he didn't exercise the power." Well, I guess that would mean it wouldn't be illegal if it never came to light, which I don't think is the law. The requirement for the marital deduction trust, as far as the federal law is concerned, is that there be an unrestricted power of appointment and if there is any side agreement putting a restriction on that power of appointment, we submit, your Honor, that it is clearly unlawful. [18 RT 4515-16.]

APPENDIX II.

A. THE ORAL AGREEMENT IS UNENFORCEABLE BECAUSE IT IS AGAINST PUBLIC POLICY. (APPELLANTS' OPENING BRIEF.)

The marital deduction available under federal and state law is permissible only if the surviving spouse receiving the property has the *unrestricted* right to give the property *to anyone.*[3] If any restriction is placed upon the survivor's power over the marital deduction property, or if any interest therein is created in a third person; the deduction is destroyed. For example, if the surviving spouse is bound by contract, as the trial court found in the case at bar, to bequeath or devise the property to any particular person or persons, the deduction is lost. *Batterton v. U.S.*, 406 F. 2d 247 (C.A. 5, 1968); *Lindsay v. U.S.*, 167 F. Supp. 136 (D.C. Md. 1952); U.S. Treas. Estate Tax Reg. §2056 (b)(5)(g)(2) ". . . However, if the surviving spouse entered into a binding agreement with the decedent to exercise the power only in favor of their issue, that condition [unrestricted power to appoint] is not met."

Ann's will [Ex. 30] codicil [Ex. 31], and trust [Exs. 32 and 33] which were operative at her death contained provisions for marital deduction trusts giving Samuel substantially one half of her separate property *with the unrestricted power to dispose of it to anyone at his death.* Ann specifically directed the inclusion of this tax savings provision in her estate plan after the requirements were explained to her [10 R. T., 2590, 2598-99; 14 R. T., 3687, 3689]. The maximum marital deduction was claimed and allowed in Ann's estate

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[3]See Section 2056 of the Internal Revenue Code (26 U.S.C. §2056) and Section 13805 of the California Revenue and Taxation Code.

without disclosure of the oral agreement [Ex. 114]. Had it been disclosed, the marital deduction would not have been allowed and Ann's death taxes would have been increased by an additional sum of $178,000 over the $133,000 actually paid [14 R. T. 3710; Ex. 114].

Allowance of the marital deduction is uniquely dependent upon written documents such as written wills or trust instruments. Enforcement of oral agreements in contravention of the provisions of written instruments providing for the marital deduction will invite tax avoidance by those who act in ignorance of the law and encourage tax evasion by others who know the law and seek to take unlawful advantage of it. Husbands and wives whose estate plans qualify for the marital deduction will be free to make oral agreements restricting the power of the survivor to dispose of property and still claim the deduction. If the survivor performs the oral agreement, the federal and California governments will have been improperly deprived of taxes and no one will be the wiser. If the survivor does not perform the agreement, a third party beneficiary can enlist the aid of the courts in the hope of a finding that the unlawful effect of the oral agreement was unintentional. Under such circumstances, the courts refuse to enforce such oral agreements as against public policy protecting the tax laws and their administration.

In *Kopasz v. Wymer*, 118 Cal. App. 2d 119, 257 P. 2d 707 (1953) a dispute arose between the beneficiaries of a decedent's estate concerning whether certain property was the separate property of the decedent's wife or whether it belonged to the estate. In an effort to resolve the controversy out of court, the parties entered into a written agreement providing that the de-

cedent's wife would distribute a specified share of the property to a beneficiary in return for a promise to refrain from litigating the matter. Although innocently made, the court refused to enforce the agreement because one of its effects was to:

> "... *deprive the State of California and the United States Government of taxes properly due on said property.*
>
> "It is thus clear that the agreement was void as against public policy ..." (Emphasis added).

Stockton Morris Plan Co. v. California Tractor & Equipment Corp., 112 Cal. App. 2d 684, 247 P. 2d 90 (1952), demonstrates that a court will refuse to enforce a contract if its mere tendency is to promote unlawful acts, even if its illegal effect is not understood by the parties. In *Stockton*, plaintiff finance company filed an action based upon the breach of a conditional sales contract for the sale of certain equipment made with an employee of a county district. It was determined after assignment of the agreement to plaintiffs that the district was not a legal entity capable of contracting and that the agreement was violative of the state constitution in certain respects. The lower court decision, granting the plaintiff relief, was reversed on appeal, the appellate court quoting 12 Am. Jur. "Contracts," pp. 643-44 with approval, as follows:

> "If the effect of the agreement is to accomplish an unlawful purpose, however, the agreement will be declared illegal *regardless of the intention of the parties. Indeed, the mere tendency of an agreement to promote unlawful acts may render it illegal as against the policy of the law.*" (Emphasis added).

And in *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 Pac. 947 (1926), the court on appeal, refused to give effect to an unduly broad exculpatory agreement between a bank and its depositor on the ground, among others, that the agreement was against public policy and void:

> "As to whether an agreement is or is not contrary to public policy, we quote from 13 Cal. Jur. 424, § 360:
>
> "'If an agreement binds the parties, or either of them, to do, or if the consideration is to do, something opposed to the public policy of the state or nation, it is illegal and absolutely void, *however solemnly made*. It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be designated; as it sometimes has been, the policy of the law or public policy in relation to the administration of the law. Where a contract belongs to this class it will be declared void, although in the particular instance no injury to the public may have resulted. *In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interest of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case.*'" (Emphasis added.)

See also: *Cole v. Ames*, 155 Cal. App. 2d 8, 317 P. 2d 662 (1957), where the court cancelled a note and

deed of trust which exceeded the permissible purchase price under a Veterans Administration loan, even though the parties did not actively participate in procuring the loan and were not cognizant of any violation of federal law.

The foregoing authorities clearly demonstrate that public policy requires the courts to refuse to enforce oral agreements in all cases where they contravene written provisions of a will or trust designed to establish a marital deduction. The policy applies with special force where, as here, one seeks and receives legal and tax advice with respect to the preparation of written documents that are the sole basis for establishing the marital deduction both before and *after* the oral agreement. In this case, after Ann Hayden sought and received legal and tax advice from her experienced advisors, she instructed her accountant to consult with her lawyers and her lawyers to prepare her will and trust in order to obtain the marital deduction that reduced her death taxes by more than one half. When she decided to change the rights of the parties under her written estate plan and consulted with her lawyer and accountant for that purpose in March, 1963, after the oral agreement was made, she had a duty to disclose to them any agreement changing her legatees' rights as set out in her testamentary instruments and to request them to make the necessary changes. The duty to disclose is particularly clear in this case where Ann formally amended her estate plan *after* her oral expressions of intent on February 23, 1963, and expressly reaffirmed

her earlier provisions for Samuel giving him her property with the unrestricted right to transfer it to anyone, the result of which preserved for Ann's estate the marital deduction. Under such circumstances, a breach of the duty to fully disclose renders the earlier oral agreement unlawful and unenforceable.

The vital importance of the public policy that a state court not enforce a written or oral agreement in conflict with the decedent's written marital deduction provisions arises from the following facts and considerations, which not only result in injuries to the public and public good, but specifically have the most destructive effects upon the tax laws, tax administration and tax practice.

a. The tax benefits are matters of legislative grace based upon strict statutory conditions required to be set out in the documents of transfer (here the will and trust documents).

b. Those written documents are the only basis that those who prepare the California Inheritance and Federal Estate Tax returns have in claiming the tax benefits that reduce by more than one half the death taxes that would otherwise be payable by the estate.

c. There is no way to ascertain or to ask the deceased person whether he or she placed an oral limitation on the marital deduction provisions.

d. The state and federal revenue agents allow the marital deduction tax benefits on their audit if the written documents properly so provide. If they knew of any agreement altering the docu-

ments of transfer, they would have to disallow the deduction.

e. Except for refusing to enforce them, there is no effective deterrent against secret agreements limiting the marital deduction provisions since criminal tax fraud cannot be asserted against either party because both are dead before the dispute arises.

f. The tax laws are administered generally on the basis of a full and truthful disclosure by taxpayers. *Webb v. Standard Oil Company of California*, 49 Cal. 2d 509, 319 P. 2d 621 (1957). To facilitate tax collection and prevent tax evasion taxpayers must be discouraged from concealing or otherwise failing to communicate to their advisors any agreements which may affect the amount of tax due the federal and state governments.

It is submitted that if respondent prevails, she will benefit greatly from Ann's noncompliance with the marital deduction provisions; such a result will encourage other husbands and wives to make the same kind of oral agreement. They could take the benefits of the tax savings and escape criminal punishment by their demise. If the undisclosed agreement were performed, the tax authorities would never know about it. If the undisclosed agreement were not performed, their third party beneficiary could rely on the California courts to carry it out. Neither result is consistent with sound public policy.

III.

THE ORAL AGREEMENT IS UNENFORCEABLE BECAUSE IT IS AGAINST PUBLIC POLICY. (APPELLANTS' REPLY BRIEF.)

Respondent's argument is that the oral agreement was purely a private matter between Samuel, Ann and herself; that the State of California and the United States Government, and the taxpayers that they represent, are not involved and have no interest in the agreement, its tax consequences, the effect of enforcing it upon the tax laws, or whether it encourages unlawful schemes to evade death taxes. Respondent's argument would have merit if Ann and Samuel had not carefully chosen to include the maximum marital deduction trust benefits in their respective estate plans.

Spouses may create a marital deduction as to one-half of the separate property of the first to die by granting the survivor full power to transfer the property to *anyone* at death. The property thus may be passed from one spouse to the other *tax free*. Alternatively, spouses may grant a life estate to the survivor specifically designating the person or persons who shall inherit the property after the death of the last surviving spouse. A transfer under these circumstances is fully taxable in the estate of the spouse first to die because the surviving spouse is given no choice in selecting the person to whom the property shall pass. Married persons have complete freedom to select the estate plan which best suits them. If the tax-free marital deduction is selected, the federal and state governments and the

public are vitally interested because no taxes are collected from the property and the tax burden is shifted onto others who bear it.

Appellants have set forth the tax laws, cases and reasons why this oral agreement is against public policy and unenforceable (App. Op. Br. pp. 24-30). The greatest danger in such an *oral* agreement is that it provides virtually a foolproof way of defrauding the governments out of taxes properly due. If the marital deduction trusts were amended in writing to restrict the disposition of the remainder, the deduction immediately would be destroyed. An oral agreement, *if performed*, never would be discovered; the governments are defrauded and the third party beneficiary reaps the unlawful benefits. If the oral agreement is not performed, the beneficiary may accept the risk of losing some tax benefits in an attempt to enforce the agreement. Under such circumstances, the federal and state governments are bound to be shortchanged.

Had Samuel performed the oral promise which Ann extracted, the federal and state taxing authorities would be deprived forever from learning that the marital deduction was improperly claimed. Administration of the tax laws cannot be made to depend upon whether such an oral agreement is voluntarily performed. Written wills and trusts of a decedent clearly are intended to be cornerstones for calculation of death taxes, and it is upon these documents that state and federal taxing authorities primarily rely. Appellants respectfully submit that if the oral agreement in this case is upheld, it will create an estate planning device that will invite every husband and wife with substantial separate property to circumvent the statutory requirements for the

marital deduction and still claim tax benefits which may eliminate more than one-half of death taxes.

Respondent cites a number of cases at pages 32-33[2] stating that an oral contract to provide by will is enforceable in California. As an abstract point of law, this undoubtedly is correct. None of the cases cited, however, involves a contract which was asserted to be contrary to public policy or illegal. The facts in each case cited by respondent are substantially different from those in the case at bar since Ann, the party extracting the promise from Samuel, modified her estate plan in writing *after* the oral agreement was made, and reaffirmed her intention to provide a full one-half of her estate for Samuel in a marital deduction trust to obtain substantial death tax savings; clearly this is directly contrary to her *earlier oral* wish limiting Samuel's power to give her property only to respondent. None of the cases cited by respondent has facts which raise policy considerations of enforcement of the federal estate and state inheritance tax laws.

Throughout, respondent insists upon isolating the words spoken by Ann and Samuel from the testamentary plans of the parties and their conduct both before and after the agreement was made. Respondent argues that the "agreement does not contemplate or require anything illegal in its performance;" that the agreement does not have "any unlawful purpose;" that "there is no violation of law involved in the agreement;" and that the agreement "had nothing whatever to do with a 'marital deduction'". (Resp. Br. p. 29). Although the

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[2]*Day v. Greene*, 59 Cal. 2d 404; *Brewer v. Simpson*, 53 Cal. 2d 567; *Monarco v. LoGreco*, 35 Cal. 2d 621; *Brown v. Superior Court*, 34 Cal. 2d 559; *Porporato v. Devincenzi*, 261 Cal. App. 2d 670; *Goldstein v. Hoffman*, 213 Cal. App. 2d 803.

precise words spoken by Ann and Samuel may not conjure up an illegal purpose or violation of law, the agreement nevertheless may be contrary to public policy and unenforceable if, under the particular circumstances involved, its effect or tendency will be to promote unlawful acts. Respondent overlooks this fact.

> "If the effect of the agreement is to accomplish an unlawful purpose, however, the agreement will be declared illegal regardless of the intention of the parties. *Indeed, the mere tendency of an agreement to promote unlawful acts may render it illegal as against the policy of the law.*" (Emphasis added). *Stockton Morris Plan Co. v. California Tractor & Equipment Corp.*, 112 Cal. App. 2d 684 (1952), discussed at page 25 *et seq.* in appellants' opening brief together with other pertinent cases.

Respondent mistakenly argues that the "mere fact that Ann's *previous testamentary plans* contain provisions for marital deduction trusts in favor of Samuel and gave Samuel an unrestricted power of appointment, *is entirely immaterial and beside the point, since they were superseded by and not part of the agreement.* Therefore, they can have absolutely no effect on the subsequent Agreement made between Ann and Samuel." (Resp. Br. p. 33; emphasis the respondent's). This argument completely begs the point. Enforcement of such agreements is contrary to public policy simply because it would encourage the establishment of written estate plans providing for the marital deduction with secret oral agreements contrary thereto.

Respondent maintains that Samuel wrongfully took advantage of the marital deduction "for his own gain." (Resp. Br. p. 31). This is not correct. The tax savings to be achieved by the establishment of a marital deduction trust inured directly to the respondent, not Samuel. Under Ann's trust and will, all death taxes were to be paid out of the residue [Exs. 30, 32, 33] and it was the respondent who was residuary beneficiary. Thus, if the marital deduction were disallowed, the additional taxes ($178,000.00) would have been borne by the respondent.

The facts of this case are unique. If this court takes the opportunity presented in the case at bar to protect the federal and state policies underlying the administration and enforcement of the federal estate and state inheritance tax laws, persons in similar factual circumstances will be discouraged from attempting to obtain improper tax deductions. On the other hand, enforcement of the oral contract in this case clearly will tend to promote this undesirable practice in the future. To assert, as respondent has, that this is only a simple oral contract to provide by will is unrealistic. Appellants respectfully urge this court to analyse the oral agreement as set in the particular factual context of this case, and then to determine whether or not the enforcement will tend "to promote unlawful acts . . . regardless of the intention of the parties." *Stockton-Morris Plan Co. v. California Tractor & Equipment Corp., supra.*

The inevitable effect of the court's judgment under the facts of this case is spelled out in detail in appellants' opening brief at pages 24-30. This case is not one in which the court merely must decide who, among respondent and Samuel's wife and children, are to receive property. It involves the question of whether the court will protect the administration of the California and federal tax laws. Respondent's statement that "similar agreements have been consistently upheld by the California courts" (Resp. Br. p. 27) is incorrect. No court ever has upheld an oral (or written) agreement which invited tax evasion as in this case. This is a case of first impression in California, and pursuant to appellants' research, in the United States.